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Stanley Berge

THE LEGAL STATUS OF EXECUTIVE AGREEMENTS ON AIR TRANSPORTATION — PART II
Oliver J. Lissitzyn

AIR TRAFFIC FORECASTING FOR THE NEW YORK-NEW JERSEY PORT DISTRICT — PART II
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EFFECTS OF COMPETITION AND CHANGES IN ROUTE STRUCTURE ON GROWTH OF DOMESTIC AIR TRAVEL
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THE JOURNAL OF
AIR LAW AND COMMERCE

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SUBSIDIES AND COMPETITION AS FACTORS IN AIR TRANSPORT POLICY*

By Stanley Berge

Professor of Transportation, Northwestern University School of Commerce; Associate Editor, Journal of Air Law and Commerce; Transportation Economist and Management Consultant; B.S. 1932, M.B.A. 1934, Northwestern University; Lt. Commander, USNR; *Formerly*, Manager of Traffic Research, Illinois Central Railroad; Member of Management Engineer's Staff, Executive Office of the Secretary of the Navy.

IN April 1949 the Senate Committee on Interstate and Foreign Commerce began to hold a series of hearings for the purpose of investigating the financial stability and operational efficiency of the air-line industry. These hearings continued through June 1949 and were resumed again for two days in January of this year. Subsequently, a document of some 2,500 pages has been published containing the testimony of 86 persons, in addition to considerable correspondence and miscellaneous data.

The purpose of the investigation, as revealed in the letter signed by Senator Edwin C. Johnson, Chairman of the Committee, inviting witnesses to appear was "to learn why, in a period of unprecedented prosperity, the air-line industry is in such poor financial condition."

The letter further asked: "Can it be explained by excessive competition? Is it poor management and loose, easy-going financial policies? Are there too many vice presidents with unlimited expense accounts and too elaborate downtown ticket offices? Is it the continuing impact of postwar reconversion and expansion? Has it resulted from administrative practices by the Civil Aeronautics Board or the Civil Aeronautics Administration? Is it due to policies laid down by Congress?"[1] These and other questions were asked.

* Paper prepared for the Annual Meeting of the American Economic Association, Chicago, Illinois, December 27, 1950.

[1] *Air-line Industry Investigation.* Hearings pursuant to S. Res. 50 before the Committee on Interstate and Foreign Commerce, United States Senate, 81st Congress, 1st and 2nd Sessions (April 11, 1949-Jan. 31, 1950) p. 2.

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Subsidy and Competition are Major Issues

Review of the testimony collected during the "Air-line Industry Investigation" finds two major issues continually crowding other problems of public policy from the scene. The first is the question of *subsidy* – to what extent should commercial air transportation be promoted by means of public aids or subsidies? The second is the question of *competition* – to what extent should competition be restricted in commercial air transportation? At the risk of neglecting other important areas of public policy toward air commerce, it seems desirable because of their pre-eminence to limit this discussion to a brief consideration of these two areas of great controversy.

Inasmuch as freedom from government support and freedom from government control are often considered essential to the preservation of the American system of private enterprise, we may well consider the possible short-run and long-run effects of surrendering these freedoms to a considerable extent in our public policy toward commercial aviation. It has been said that the price of security is the loss of freedom. Thus, there is a distinct relationship between government subsidy and government control – not only of competition but of many other things. He who accepts subsidy must accept government control.

Competition may be restricted in transportation even without regard to the question of subsidy. Since 1920 railroad competition has been subject to government restrictions and the same has been true of motor carrier competition since 1935. These restrictions of free competition in transportation have been based on a fairly recent development in the philosophy of transportation regulation, namely, protection of the carrier from "excessive" or "destructive" competition. Because this is a far cry from the original public policy of encouraging carrier competition and restricting monopoly, it represents a highly controversial question. The question resolves itself to whether, like railroads, air lines shall be treated as *public utilities* and subjected to the full gamut of public utility controls, or whether they will serve the public better and achieve greater prosperity if treated as relatively free competitive enterprises performing a public service.

Nature and Extent of Air Transport Subsidies

What is subsidy? What is public aid? Are these two things equivalent? While the two terms are frequently used interchangeably, there might be some advantage to making a distinction between them. Fundamentally, a subsidy is a gift – a one-way transaction, without provision for repayment. Public aids, on the other hand, are often in the nature of temporary grants or loans – two-way transactions, with definite provision for reimbursement of the public treasury. It is important to note that *public aids may include subsidies* as well as temporary

aids which are eventually repaid in some tangible way. Thus "public aid" is a broader term than "subsidy." [1a]

A recent study entitled *Subsidies to Transportation* by Burton N. Behling, states that "in addition to the element of direct subsidy included in air-mail payments to the domestic and U.S. flag international airlines, these carriers also are subsidized (indirectly) by the provision of airport and airway facilities and other navigation aids."[2] The airlines have also benefited from government aeronautical research and development and this type of aid may become more imporant if Congress decides to finance the development of "prototype" aircraft for both civil and military purposes.

In order to assist an infant air transport industry, Congress in 1938 authorized the payment of subsidies, in the form of air-mail pay, to meet the legitimate financial needs of the certificated air carriers.[3] The valid measure of the amount of subsidy to the carriers receiving air-mail payments is the excess of such payments over the costs to the carriers of rendering the air-mail service, including a reasonable allowance for return on investment.[4] In recent years air-mail payments have increased substantially – from $46 million to all air carriers in 1946 to $112 million in 1949. In addition, in 1949 the carriers received $30 million in retroactive mail pay to cover their losses before 1949. When various witnesses were asked how much of the air-mail pay represented subsidy, no one could say. Estimates ranged from 40 to 60 per cent.[5] The problem was sized up thus by Postmaster General Donaldson:

> "The total cost for both domestic and foreign air mail this year . . . is, in round numbers, about $120 million, and by the highest stretch of the imagination you could not presume to state that the subsidy would be more than half of that, if that much . . . I have my doubts about the subsidy being more than around $35 million, but nobody has yet determined what is the fair and reasonable rate we should pay for this service that is performed for us, and until

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[1a] See *U.S. Federal Coordinator of Transportation*, Public Aids to Transportation, Vol. 1 p. 4 footnotes and the sentence: "It became clear early in . . . this series of studies that the term 'subsidy,' *unless given a much broader meaning than it commonly conveys*, would not suffice to cover the varied forms which (public) aid to transportation has taken." (Italics supplied.) On the other hand, the *U.S. Board of Investigation and Research*, Public Aids to Domestic Transportation (p. 53) does not clear up the confusion when it says "There appears to be no significant difference between 'public aid' and 'subsidy,' and hence the two terms are used interchangeably . . ." Webster's International Dictionary emphasizes the *gift* aspect of subsidies. RFC loans and Federal land grants to railroads are good examples of public aids, but since they involved definite terms for recompense to the government, they cannot be considered gifts or as having any likeness whatsoever to the ordinary concept of subsidies, viz., agricultural subsidies.

[2] Behling, Burton N. *Subsidies to Transportation*, Library of Congress, Legislative Reference Service, Public Affairs Bulletin, No. 86, August 1950, p. 30.

[3] Article by Senator Edwin C. Johnson, "Proposed Senate Action on Air Mail Subsidies" 17 J. Air L. & Com. 253 (Summer 1950).

[4] U. S. Board of Investigation and Research. *Public Aids to Domestic Transportation* (H. Doc. 159, 79th Cong. 1st sess., staff report, p. 75).

[5] Article by Senator Edwin C. Johnson, *op. cit.* p. 254.

> somebody determines what we ought to pay the air carrier for the service he performs for us and what is the right rate of pay we should pay him, then and only then can you separate the subsidy from the total payment."[6]

There has come to be general agreement not only among committees of Congress and government agencies concerned, but also among some of the scheduled air-mail carriers that subsidy should be separated from mail pay. For instance, President E. V. Rickenbacker of Eastern Air Lines told the Senate Interstate and Foreign Commerce Committee:

> "A tragic error which has been committed by the CAB and by many of the leaders of the industry has been the assumption that Section 2 and Section 406—the mail pay section—of the act have set air transportation apart from all other businesses and have made it immune to the grim necessities of sound business practices and have promised it a blank check and have guaranteed each air carrier a livelihood at the expense of the taxpayers."[7]

In an interim report submitted May 5, 1950 to the Senate Appropriations Committee, Senator Johnson recommended that subsidy be separated from air mail payments. However, he suggested that the direct subsidy for domestic air transportation "should be specifically identified and presented to Congress on a community basis." His report referred to significant evidence collected by his committee that, in general, airlines carrying only a long-haul business and servicing but a few high-density points could operate profitably without direct subsidy.[8] Thus considerable attention is currently being given to the subsidy element in air-mail pay. But, what about the indirect subsidies to commercial air transportation through provision of airways and airports at public expense?

Taxpayers of the United States have an investment of about one and one-half billion dollars in civil airports. Of the larger airports, which are financed by Federal, State and local appropriations, only a handful are self-supporting even to the extent of returning out-of pocket operating and maintenance expenses.[9] The Federal Aid Airport Program for the 1951 fiscal year involves a total expenditure of $51 million of which $25 million is Federal funds and $26 million are state and local funds.[10]

From its inception in 1925 through the year 1949 total expenditures on the Federal Airways System amounted to $478 million of

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[6] *Air-Line Industry Investigation, op. cit. pp.* 1296, 1298.

[7] *Ibid.* p. 1112.

[8] *Separation of Air Mail Pay from Subsidy,* Committee print reproduced in 17 J. Air L. & Com. 333-346 (Summer 1950). See also address by Edw. C. Sweeney, "Identification of Air Mail Subsidy and Its Effect on Airline Communities," 17 J. Air L. & Com. 459 (Autumn 1950).

[9] *Air-line Industry Investigation.* (Testimony of D. W. Rentzel, Administrator of Civil Aeronautics, April 14, 1949) p. 177.

[10] *Competitive Transportation Review,* Association of American Railroads, November 1950, p. 10.

which nearly three-fourths was for operation and maintenance and the remainder was classed as "cost of establishment." [11] According to the Federal budget, expenditures for the development, installation, and operation of airway facilities are estimated at $136 million for the fiscal year 1951. As now projected, the system of electronic airway navigation aids under the so-called SC-31 program is expected to require 15 years for completion and will cost an estimated $1,113,000,000.[12]

The problem in connection with airport and airway aids is to determine the proper shares attributable to the several classes of beneficiaries – government and the military, private flying, and commercial airlines. Then arises the question of suitable user charges. To date the air lines have paid no user charges for the Federal airways facilities and other navigation aids. However, the Civil Aeronautics Administration has proposed that "the initial step toward making the Federal Airways self-supporting beginning in 1953, with a tax of 1.5 cents per gallon on high-octane aviation gasoline." The estimated return from such a tax would be $8,500,000 annually.[13]

Commercial air lines ordinarily pay airport landing fees at rates determined by negotiations between the municipality and the carrier. Through landing fees and other revenue sources, including terminal building concessions, it is believed that, within a comparatively few years, the majority of the large terminal-type airports can be made self-supporting.[14] In June this year a spokesman for the United States Chamber of Commerce recommended to a House subcommittee that the Federal Airport Act should be amended to exclude local and personal flying airports, and all airport buildings and land, from participation in federal aid and make it clear that federal-aid funds should not be made available for airport maintenance. The funds, he added, should be restricted to the federal share of costs of grading, drainage, runway construction, lighting and radio aids to navigation at airports of interstate importance.[15]

Infant Industry and Defense Considerations

Direct air-mail subsidies and indirect airway and airport aids to air commerce have been justified on the two grounds of infant industry and national defense. It has long been a tradition in this country to encourage the early growth of desired transport techniques through public aids and subsidies. While there is feeling in some quarters that commercial air transportation is no longer an infant industry and has passed the stage of "coddling and wet nursing," the defense argument

[11] Dearing, Charles L. and Wilfred Owen. *National Transportation Policy.* Wash. D. C., Brookings Institution, 1949, p. 21.

[12] Behling, Burton N. *op. cit.* p. 43.

[13] *Ibid.* p. 44.

[14] Bollinger, Lynn L., Alan Passen and Robert McElfresh, *Terminal Airport Financing and Management.* Division of Research, Graduate School of Business Administration, Harvard University, Cambridge, 1946, p. 4.

[15] *Competitive Transportation Review,* op. cit., July 1950, p. 9.

nevertheless still weighs heavily. To appreciate this we need only refer to the *Report of the Congressional Aviation Policy Board* (1948) which states:

> "Airway facilities which give scheduled dependability to civil air lines also give tactical dependability to military air forces. Airports which serve the burden of national and international traffic also can base tactical or strategic combat squadrons. Transport fleets which serve commerce in peace can tie together tactical and administrative requirements in war."

From the military viewpoint, it would seem that an industry with the maximum number of modern planes and trained personnel is desired as a potential reservoir to draw upon in an emergency.[16]

In view of defense considerations it may seem academic to anticipate a self-sustaining system of commercial air transport in the near future. Nevertheless, this should not be abandoned as a long-term goal. In the meantime it seems highly desirable to make a reasonable attempt to *earmark and budget* those public funds devoted to air commerce on behalf of national defense. There are questions of economics which cannot be overlooked in the *logistics* of all-out modern war. As stated by the Secretary of Defense in his report for 1948: "One of the great problems from which the Military Establishment cannot divorce itself is the complex one of securing proper balance between military necessities and national solvency. The capacity for making war is not separable from economics any more than it is from diplomacy."

Regulation of Competition

How much competition is desirable in commercial air transportation? Is excessive competition responsible for the postwar financial difficulties of the airlines? If competition is to be controlled, what standards should guide such control? What effects might result from modifying or relinquishing some of the present controls over competition? What effects might result from continuing or intensifying present restrictions on competition?

Many airline witnesses appearing during the Senate Air-line Industry Investigation have criticized the Civil Aeronautics Board for excessive "duplication and triplication of routes" resulting from overly liberal issuance of certificates of public convenience and necessity.[17] However, the Chairman of the Board took the position that over-optimism with regard to the postwar expansion of the air transport market was not solely confined to the Civil Aeronautics Board.[18] Had not the carriers who now complained of excessive competition been the very carriers who had requested and received the majority of the additional

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[16] *Air-line Industry Investigation*, op. cit., statement by Richard Hellman, p. 2124.

[17] *Ibid.*, pp. 671, 742, and 1127 (Testimony of Messrs. Patterson, Smith, and Rickenbacker).

[18] *Ibid.*, p. 55 and 60.

routes approved by the Board after lengthy hearings? Suppose the market had expanded and the Board had been extremely conservative in approving new routes and route extensions, would the Board then have been guilty of stifling a dynamic industry or encouraging monopolistic tendencies? Hindsight is always better than foresight.

What policy has been prescribed by the Congress with regard to regulation of competition in air transportation? The Declaration of Policy in the Civil Aeronautics Act (Section 2) directs the Board to consider the matter of competition as follows: "(c) The promotion of adequate, economical and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive pactices; (d) Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense." It is clear from this that our public policy favors competition with the exception of *unfair or destructive competitive practices.* Congress left it to the Board to determine the *extent* of competition necessary to assure the sound development of air transportation.

The Route Pattern

The present air route pattern is the result of competition and the combined judgment of the Post Office Department and the Civil Aeronautics Board. Competitive bidding for air mail contracts produced the basic pattern of the 39,267-mile domestic system in 1938 which constituted the so-called "grandfather routes" inherited by the Civil Aeronautics Board from the Post Office Department. Subsequently, competitive applications for certificates of public convenience and necessity awarded upon basis of the judgment of the Board caused the domestic routes to expand from 39,000 miles to 146,000 miles and the international and overseas routes from 31,000 miles to 210,000 miles.[19] Eloquent testimony, copious briefs and a most convincing array of exhibits were showered on the Board. The public, represented by chambers of commerce, frequently asked leave to intervene, always in favor of new routes or route extensions proposed. About the only opposition came from other air carriers whose motives were somewhat transparent. Statistical trends pointed upward. It is not surprising that the Civil Aeronautics Board found its "sales resistance" no match for such enthusiasm.

Now, however, the tide has turned: competition in air transportation is believed by many to be *excessive.* But, how much competition is just the right amount? How much is too much? At the present time, we have 16 common carrier trunk lines, 17 feeder lines, and 2 helicopter services operating under "permanent" or "temporary" cer-

[19] Adams, Russell B., "The Air Route Pattern Problem." 17 J. of Air L. & Com. 127 (Spring 1950).

tificates.[20] We also have a considerable number of non-scheduled so-called "irregular air carriers" providing low-price "aircoach" service and three certificated air-freight carriers. Neither the irregulars nor the air-freight carriers receive any air mail subsidy. While this list is not complete, it may be said to fairly represent the amount of competition now present in the air transport system of the United States. Is this too much competition? Are there now too many air carriers? Would it be sound public policy to "freeze" the existing competitive pattern of common carriers? Should the existing domestic route pattern serving some 600 cities be established as the permanent inflexible sovereignty of the existing certificate-holders? Shall the future competitive pattern be static or dynamic? Shall all newcomers, even when not desirous of mail subsidy, be considered to be undesirable "interlopers" molesting the tranquillity and stability of the protected oligopoly of "pioneers"? Shall the wings of commercial flying be clipped in order to accomplish a *public utility status* in air transportation by legislative fiat in spite of the fact that air transportation lacks the economic characteristics of typical public utility industries?

Shall Air Transport Be Regulated as a Public Utility?

Today, the public utility concept has become so broad as to practically defy clear definition. The term is used to cover a variety of unlike situations. Unfortunately, the indiscriminate use of the term *public utility* has led to the assumption that all so-called public utilities should be subjected to the same type of public regulation. Thus, not only railroads but motor, water, and air carriers are loosely called public utilities despite vast differences between the economic characteristics of these transportation industries as compared with the typical characteristics of gas, electric power, and telephone utilities.

The traditional purpose of public utility regulation was to protect the consumers from the results of the "natural monopoly" characteristics of railroads as well as gas, electric and telephone utilities. Yet the philosophy of railroad regulation still attempts to enforce competition between railroads, whereas in the gas, electric, and telephone utilities our regulatory policy long ago abandoned enforced competition in favor of closely regulated monopoly or duopoly. Still the railroads had (until 1920 at least) sufficient monopoly power to justify similar types of controls as were applied to the other monopolistic utilities.

After 1920, Federal regulation of railroads took on the somewhat contradictory policy of *protection to existing carriers* (at least in "lip service") combined with traditional restraint of monopoly by enforcement of competition and control of prices and services. *Government then took on the role of entrepreneur as well as that of policeman.* As is well known, railroads are today so completely regulated as to have

[20] Article by Senator Edwin C. Johnson, *op. cit.* p. 253.

lost nearly all of the prerogatives of management essential to competitive private enterprise.

In 1935, largely upon the recommendation of the railroads and certain government agencies, the Motor Carrier Act was passed containing nearly all of the contradictory elements which had developed during the previous half century of railroad regulation. Then in 1938 the Civil Aeronautics Act was passed containing control of entry and many other provisions literally copied from the Motor Carrier Act. It is significant that both of these laws were passed with the declared purpose of *stabilizing* both the motor carrier and air carrier industries. Conditions in each of these new transport industries prior to Federal regulation were said to be "chaotic." Yet neither motor nor air transportation regulation was the result of the public clamor which demanded restrictive regulation of the railroads. Perhaps the shipping and traveling public preferred the so-called "chaos" of free competition as compared with the "stability of government control." Very significantly it was not the public, but the larger and stronger of the existing air carriers in 1938, who asked a most obliging Federal Government to assume the same dual role of entreprenuer and policeman which it had been performing for the railroads since 1920. Temporary security was won by the sacrifice of future freedom.

Yet the Congress in the Civil Aeronautics Act was unable to reach the conclusion that air transportation conformed to the ordinary concept of a public utility. The Congress "was trying to evolve a type of regulation which would keep the benefits of competition. It was attempting to combine the best features of the regulation of public utilities and competition under the private enterprise system." [21]

As stated by former Chairman O'Connell of the Civil Aeronautics Board:

> "There are at least some reasons to believe that the inevitability of the monopoly idea is not as present (in the air transport industry) as in some types of industries . . . You do not have the terrific amount of fixed capital investment . . . in the aviation business, which is involved in electric-light plants or other utilities, as well as the railroads. The capital investment is very small."[22]

It may be added that, while it requires more capital to engage in air transport than in motor transport, the amount in either case is minuscule as compared with that required to build a railroad or a gas plant. Actually it may be said that the *only* way to achieve conditions approaching monopoly in air transport is by closely restricting entry to this industry.

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[21] *Air-line Industry Investigation, op. cit.*, Joseph J. O'Connell, Chairman of the Civil Aeronautics Board in reply to Senator Bricker, who had said, "A public utility generally is considered to be more efficient if it is not competitive . . . Competition in the public utility field is always inefficient if you have sufficient and adequate public regulation," p. 53.

[22] *Ibid.*, p. 54.

PUBLIC UTILITY REGULATION VS. RESPONSIBLE FREE COMPETITION

The largest part of the investment in an airline consists of aircraft, which, being of fairly standard design, are an extremely mobile form of capital. This facilitates both the entrance and exit of capital from the industry in contrast to the great immobility of railroad and utility plant capital. Another significant difference between the airlines which Senator Johnson calls "quasi-utilities" [23] and the typical utility industries is the ratio of fixed and variable costs. As presently operated, by far the largest proportion of airline costs is variable — a very small proportion is fixed. Ordinary public utilities, on the other hand, are faced with a large element of fixed cost. The desire for combination, to achieve large-scale efficiency and decreasing costs, plus a strong motive for discriminatory pricing are thus logical in the ordinary utilities and in the railroad business. These economic characteristics are not evident to any appreciable extent in the air transport industry of the present day.

Aside from the element of monopoly control present in public utility regulation, there are also practical *physical limitations* which argue against competitive gas mains, power lines, or street car lines down city streets. While the physical limitations of a single airport and its approaches are undeniably limited, the limitations against *additional* airports are more often economic than physical. Furthermore, the majority of our airports today are substantially under-utilized. It is certain that most airports would welcome *more* competitive air transport services in place of restricted competition. Can anyone think of a single case of a municipality objecting to the Civil Aeronautics Board certifying additional air carriers to serve its airport or airports? As for the airspace, is there any medium available to domestic and world commerce which is as limitless? Here again, economic limitations, it would appear, are more controlling than physical limitations.

New electronic aids to air navigation, including the omnidirectional ranges (of which 294 are now in operation of a planned 409) will make possible relatively unobstructed traffic between domestic air terminals and promise to vastly improve the safety and dependability of air transportation.[24] The "omnirange" provides a large number of courses. Allowing a course width of 15 degrees, for example, there are 24 flight paths to or from the range.

Since neither natural monopoly considerations nor physical limitations argue against relatively free competition in air transportation, we are left with the question of which policy will yield the greatest fruits — public utility regulation or *responsible free competition.* It is believed by the writer that *responsible* free competition is vastly superior to irresponsible, uncontrolled competition. It is also believed to be

[23] Article by Senator Edwin C. Johnson, *op. cit.*, p. 257.

[24] *Air-line Industry Investigation, op. cit.*, statement by D. W. Rentzel, Administrator, Civil Aeronautics Administration, pp. 1,944 and 1,945.

superior to competition *arbitrarily* restricted by considerations other than those of safe conduct and financial responsibility.[25]

Conclusion

It may be concluded that public policy toward commercial air transportation needs re-examination especially with regard to subsidy and restriction of competition. Perhaps the problem today is not too much competition but *too much subsidized competition.* Responsible free competition cannot succeed as long as the solvency of all competitors is guaranteed by the government. The first step – that of separating subsidy from air mail pay – is already under way. Perhaps this will lead to eventual solution of the subsidy problem. The next step should be the recognition that air transportation is not inherently the type of industry which should be subjected to traditional railroad or public utility regulation. Can responsible, fair competition ever be excessive? Granted – opening the door to ambitious but responsible newcomers may constantly threaten the stability of the "pioneers" – but will it not over the years improve the stability and virility of the air transport industry? Restraint of competition, on the other hand, inevitably leads to the substitution of bureaucratic controls for managerial freedom and initiative. In the long run it may easily lead to the socialization of transport. Maximum competition, only restricted to insure fairness and responsibility, has been the key to the great accomplishments of the American system of private enterprise. Let us consider carefully before abandoning this principle in our public policy toward commercial air transportation.

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[25] An interesting sidelight on this is revealed by the following excerpts from a telegram to the Civil Aeronautics Board signed by Governor Ernest Gruening of Alaska: ". . . air transportation is indispensible to the life and economy of Alaska. The regular certificated carriers have not and do not begin to take care of Alaska's needs . . . Alaska is absolutely dependent upon the service now provided by the non-scheduled and irregular carriers. It would be a crippling blow to our entire economy to restrict them." (*Air-line Industry Investigation, op. cit.,* p. 1,197.) It may well be that the Alaskan conditions referred to here are unique and temporary in some respects.

THE LEGAL STATUS OF EXECUTIVE AGREEMENTS ON AIR TRANSPORTATION — PART II*

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THE hearings and discussions which preceded the passage of the Civil Aeronautics Act of 1938 contain many indications of the intended effect of the Act on the legal position of executive agreements on air transportation, and confirm in some important particulars the tentative conclusions set forth in the first part of this article. Other significant indications of the effect of the Act are to be found in the practice of the executive agencies.

In the years 1935-1938 numerous bills for the regulation of air transportation were introduced in Congress and extensive hearings were held. S. 2, introduced in the 75th Congress by Senator McCarran, made provision for the regulation of United States air carriers by the Interstate Commerce Commission, but did not expressly provide for similar regulation of foreign-flag air carriers. It would have required the Commission in the exercise of its duties under the act to "take into consideration all treaties, conventions, and agreements between the United States and foreign countries." This section had not been included in a previously introduced version of the bill, which merely referred to "treaties" in another section.[64] Much controversy was caused by a provision under which the Commission would have been empowered to prescribe only the *general* route to be flown outside the United States by a United States air carrier. In the hearings held on S. 2 in the spring of 1937, representatives of the Department of Commerce criticized this provision as possibly interfering with the fixing of definite routes by intergovernmental agreements, but it was defended by Senator McCarran and Colonel Edgar S. Gorrell (appearing on behalf of the Air Transport Association in support of the bill) as in no way restricting such procedure, as shown by the following excerpts:

> MR. MULLIGAN (of the Department of Commerce) . . . there is the sentiment—I know it is the sentiment of the Department of Commerce—to arrange first for the routes, arrive at an agreement for the routes to be traversed, and then to cover the operating rights by permits to be exchanged between the two governments in interest.

* Continued from Autumn issue of JOURNAL, 17 J. Air L. & Com. 436 (1950).

[64] See *infra*.

SENATOR MCCARRAN. Is not that the very spirit of this bill, as far as we can regulate it? Do you see anything in this bill that militates against it?[65]

SENATOR MCCARRAN . . . it is clear that these international agreements in which each country fixes the route to be flown within its borders by the aircraft of the other do not furnish a precedent for an assertion by this Government of power, through the action of one of its own administrative agencies, to fix detailed routes over the territory of another government. Nor is there anything in the bill that restricts the power of this Government to establish such a "definitely located route" by international agreement. If such an agreement were made, for example, with Canada, the Commission's certificate for operations within the United States would be confined to specific points on the airway designated in the United States, and, while the Commission's certificate would not purport to specify the detailed route in Canada, the carrier would be bound to fly that route, since there would be no other over which a right of flight existed. The effect of the proviso is simply to recognize very properly that the detailed route to be flown in a foreign country is a matter for that country to determine either by unilateral action or by international agreement. I note that no criticism of this provision has been made by the Department of State.[66]

COLONEL GORRELL. The Department of State will still be able to enter into whatever treaties, conventions, or agreements may be desirable. Even if this Government established, through international agreement with another country, "A definitely located route" to be followed by our carriers in that other country, there is nothing in the bill that would restrict the operation of that agreement.[67]

Agreements were also discussed with reference to the failure of the bill to provide for the operation of foreign-flag airlines:

MR. MULLIGAN. From my reading of the bill, there is no reference here to the idea of foreign-flag airlines seeking these reciprocal rights. Today that is administered by the Department of Commerce. You have said nothing of it here in the bill . . . .

SENATOR TRUMAN. Is not that covered by the phrase on treaties?

MR. MULLIGAN. The treaty phrase itself would not hold it in, Senator, because what has been done to date has been done under something less than a treaty, under a so-called exchange of notes agreement. It is very similar, of course, in effect and terms.

SENATOR AUSTIN. This says "conventions and agreements."

MR. MULLIGAN. Yes.

SENATOR AUSTIN. There might be a possible legal question raised about that language, as to whether it relates to such treaties, conventions, and agreements now in existence only, or whether the provision is also intended to include those which may hereafter be made. If that is your point, it could be very easily taken care of by two words added to the bill.[68]

Although the value of the above colloquies as part of the legislative history of the Civil Aeronautics Act is limited by the fact that they re-

[65] *Hearings on S. 2 and S. 1760* before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Congress, 1st Sess., at 95.
[66] *Id.*, at 420-421.
[67] *Id.*, at 508. See also 439-440 and 507.
[68] *Id.*, at 97.

ferred to a bill with provisions considerably different from the version finally enacted into law, they do show that the expression "treaties, conventions and agreements" was generally understood to include executive agreements – those already in existence and those yet to be made. They also indicate that executive agreements covering services on specific routes were contemplated. As further indication of the type of agreements then in the minds of the legislators, statements of the Department of State and the Department of Commerce inserted in the record are of interest.

In a letter dated December 18, 1936, from R. Walton Moore, Counselor of the Department of State, to Senator McCarran,[69] the Department made comments on S. 3027 and S. 3420 (predecessors in the 74th Congress of S. 2). The following excerpts indicate the nature of the ideas presented by the Department to the lawmakers:

> In the Department's letter of August 1, 1935, (to Senator Wheeler) commenting on Senate bill 3027, it made particular reference to the desirability of making provision for compliance with the provisions of international aeronautical agreements to which the United States may be a party, and gave a number of illustrations as to the classes of aeronautical agreements to which the United States is a party . . . foreign aircraft have been permitted to come into the United States under the terms of an aeronautical agreement between the United States and the country in which the foreign aircraft was registered, concluded pursuant to the general authority contained in section 6 of the air-commerce act to permit the entry of foreign aircraft and airmen on a reciprocal basis.
>
> The United States entered into an agreement with Colombia, effective February 23, 1929, under which commercial aircraft of each country are accorded the right to operate in territory of the other. The other air navigation agreements to which the United States is a party relate to noncommercial as well as commercial aircraft and contain a number of provisions relating to air navigation in general . . . . The effect of such an agreement is to accord to civil aircraft of each country the right to enter the other on individual flights without the necessity of obtaining an authorization for each flight from the government of the country to which the flight is to be made. While these agreements do not accord to air-transport lines of the one country the right to conduct regularly scheduled air-transport operations in the other country without its consent, it is to be observed that they contain a number of provisions that would be applicable in each country to the operation therein of regular air-transport lines of the other country if their entry should be authorized. . . . I do not, however, consider that the provisions of these agreements would constitute any obstacle to further negotiations between the United States and the countries with which it has the agreements, for the purpose of reaching an understanding in regard to the operation of air-transport lines. Such an understanding would supersede an existing bilateral air-navigation agreement insofar as it would be in conflict with any of its provisions . . . . It has been shown by experience that, in general, countries in which air navigation on an international scale is well developed are not willing to permit foreign air-transport lines to enter their territory unless reciprocal privileges are ac-

[69] *Id.*, at 356 et seq.

> corded to their own air-transport lines. This situation frequently results in negotiations through diplomatic channels for the purpose of reaching an international agreement defining the conditions under which one or more air-transport lines of the one country may be permitted to operate in the other country. So far as this Government may be concerned such negotiations would of course be conducted through the Department of State.

The Department then suggested a provision authorizing the Commission to make exemptions from the regulatory part of the bill when found necessary in connection with negotiations with a foreign country for rights to conduct regularly scheduled air transport services, and went on to say:

> Section 405 (d) contains a proviso to the effect that before issuing a certificate to an air carrier engaged in the transportation of passengers or property in foreign commerce the Commission shall take into consideration the provisions of any pertinent treaties and franchises and any and all privileges, rights, and obligations granted or imposed by any foreign country. It is suggested that the words "treaties" and "treaty" appearing in the proviso might well be omitted as unnecessary in the event that favorable action should be taken on the proposed new section relating to observance of treaties, conventions, and international agreements contained in the amendments to the bill which accompanied your letter to this Department.

The letter further suggested another proviso to the effect that nothing in the Act should be construed to prevent the negotiation of an agreement between the United States and a foreign country concerning the operation of air transport lines, and continued:

> As explained in the Department's letter of August 19, 1935, to Senator Wheeler, and in the present letter, the United States has become a party to international conventions and agreements containing provisions of importance relative to air navigation. It is expected that the negotiation of further international conventions and agreements on the subject will be found necessary. Your committee will doubtless realize the importance of the observance of the provisions of such agreements, in view of the fact that any action taken by the Interstate Commerce Commission in conflict with these agreements might result in complaints being received from the Governments with which they have been entered into.
>
> Applications of air transport lines of one country for authority to operate in territory of other countries are, as indicated above, usually the subject of negotiations conducted through diplomatic channels. As the Department of State is the agency of the Government which is charged with the conduct of foreign affairs, it is believed to be desirable that it be made clear that such negotiations shall, whenever necessary, be conducted by the Secretary of State.

Written comment on the bill by J. M. Johnson, Assistant Secretary of Commerce, dated March 11, 1937, favored intergovernmental negotiation of agreements on air routes and contained the following statement:

> The Government, at the present time and for more than a year past, has been conducting a negotiation involving the establishment of a very important foreign air route and service. An issue that

> remains to be resolved is whether one of the terminals of the route, which will traverse a number of foreign countries, will be in the United States, or in a certain foreign country.[70]

The above-quoted statements establish beyond doubt the fact that Senator McCarran and the other legislators concerned with the Civil Aeronautics bills were well aware that some executive agreements granting reciprocal operating privileges to foreign-flag air carriers were already in effect, and that other executive agreements, dealing specifically with privileges for regularly scheduled airlines, were under negotiation or in contemplation. In further elucidation of this fact, attention must be called to the provisions in the so-called "air navigation agreements" which, as stated by the Department of State in the above-quoted letter, purported to grant to foreign non-scheduled air carriers the privilege of commercial entry into the United States on individual flights without the necessity of obtaining prior authorization for each flight. It may be noted that such non-scheduled operations by foreign air carriers, if of common-carrier character, are clearly within the scope of Section 402 of the Civil Aeronautics Act and may not be exempted by the Board under Section 416 from the economic regulatory provisions of the Act.[71] The privileges of foreign air carriers with respect to such operations under the air navigation agreements would have been, therefore, more difficult to reconcile with the powers of the Board under Section 402 than the privileges of foreign air carriers with respect to regularly scheduled services under the air transport agreements, none of which relieves the foreign air carriers from the requirement of obtaining a permit from the Board before commencing operations. Yet no member of Congress appears to have at any time objected to the continued existence of the air navigation agreements.[72]

In the Spring of 1938 hearings were held on considerably modified versions (S. 3760 and H. R. 9738) of the McCarran bill. An interdepartmental committee on civil aviation took a leading part in preparing the new draft, and its representatives appeared before the Senate and House Committees. The new draft provided for a new agency, the Civil Aeronautics Authority, to administer the regulatory provisions, and provided for the issuance of permits to foreign air carriers as in Section 402 of the present Act. The provision on treaties, conventions and agreements was strengthened in language to read as in present Sec-

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[70] *Id.*, at 78. The statement evidently referred to the negotiation of the arrangement with the United Kingdom, Canada and Ireland for the trans-Atlantic route, which culminated in the issuance of reciprocal permits in April, 1937. See *supra* n. 47.

[71] Section 416 authorizes the exemption of classes of "air carriers," but makes no provision for the exemption of "foreign air carriers," from the economic regulatory provisions of the Act. The term "air carriers," according to the definitions contained in Section 1 of the Act, does not include "foreign air carriers."

[72] It is understood that in fact no foreign or United States operator proposing to conduct an international non-scheduled common carrier air transport service has attempted to make the claim that any air navigation agreement to which the United States is a party relieved him from the necessity of obtaining prior authorization for such service under the law of the country into which the service was to be operated.

tion 1102, requiring the Authority to perform its functions "consistently" with the obligations assumed by the United States in such instruments, rather than merely to take the latter "into consideration." A new Section 802 would have expressly given the Secretary of State the authority to "conclude such agreements as may be satisfactory to the Authority and the President." Clinton M. Hester, who testified on behalf of the interdepartmental committee where he had been the chairman of the drafting subcommittee, compared the new provisions with those in H. R. 7273 (the old House version corresponding to S. 2) as follows:

> Other important functions, such as the issuance of certificates and permits for overseas and foreign air transportation, will affect international relations and national defense. Therefore, it was believed essential that these functions be exercised under the direction of the President, in whom the Constitution vests such functions, rather than by an agency completely independent of the President, as is the Interstate Commerce Commission . . . .
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> . . . .The Air Commerce Act of 1926 forbids any foreign aircraft to operate within this country. While the authority of the Secretary of Commerce under that act to permit the operation of foreign private aircraft in this country is clear, his authority to permit the operation of a foreign air carrier to this country is in doubt. Consequently, a provision has been inserted in the present bill providing that no foreign air carrier shall operate to the United States unless it secures from the Authority a permit to do so. The issuance of such permits would be subject to the approval of the President.
>
> . . . . No provision is contained in H. R. 7273 providing authority for the conclusion of agreements with foreign countries relating to the establishment of air routes and services. The authority to conclude binding agreements of this kind is not clear under existing law. Consequently, a provision was inserted in the present bill which would authorize the Secretary of State to negotiate with foreign countries with a view to entering into such agreements and to conclude such agreements as may be satisfactory to the Authority and the President. . . .
>
> MR. BOREN. I would like a little clarification on that point. If the Secretary enters into a reciprocal agreement to permit the air carriers of the two countries to land on each country's shores, we will say that agreement then, as I understand your statement, would be subject to the review of the Authority and final OK of the President before it would be a binding agreement. I want to be certain about that, Mr. Hester.
>
> MR. HESTER. They would. I will ask Mr. Fagg to answer that question.
>
> MR. FAGG. Probably the agreement that would be made would be of a general nature dealing with the aircraft of one country as against another; any specific agreement with an individual carrier would be arranged by permit between each individual country.
>
> MR. BOREN. The point I wanted absolutely clear was that it would not be possible for the Secretary of State to negotiate a binding agreement that might supersede the powers of the Authority to issue the permit.

MR. FAGG. That is clear. It would not, sir.
MR. HESTER. It would not.[73]

The above passages show that the relation between executive agreements and the permits for individual foreign air carriers continued to be envisaged in precisely the same terms as during the 1937 hearings on S. 2 (see Mr. Mulligan's statement quoted *supra*). This concept had been applied in the arrangement for the trans-Atlantic route in April, 1937, and is the concept implicit in every executive agreement concerning scheduled air transport services made since the passage of the Civil Aeronautics Act. The agreement contains general undertakings as to the privileges to be mutually granted to airlines on specified routes or otherwise; the permit to the individual airline is issued by the Board under the direction of the President.

Section 802 of the bill as reported by the Committees, authorizing the Secretary of State to make agreements subject to the Authority and the President, was eliminated on the floor of the Senate, after Senator White objected to the section because it would give "no authority which the President of the United States or the executive arm of the Government does not now have as inherent in the executive authority of the United States," and because it seemed "to be a very definite limitation upon the clear authority of the Executive in negotiating international agreements." When Senator McCarran attempted to defend the section as "not taking from the President any power, permitting him to retain every power he has, and giving him more, too," Senator White objected to the concurrent power to approve the agreements which would be given to the Authority, saying that "the only body that should have any voice with respect to a negotiation conducted by the President of the United States and its conclusion is the Senate itself." When Senator McCarran offered to strike out the provision for approval of the agreements by the Authority, Senator White replied: "Except that I do not believe that the paragraph adds a single thing to the powers which are inherent in the Chief Executive. As a matter of fact, not a line of this is necessary." On a division, section 802 was stricken out by a majority of one vote.[74]

After the action had been taken, Senator Pittman said that *every* agreement is a treaty, and that section 802 was unnecessary and represented a trend away from the Constitution, but suggested that the section should be carefully studied in conference and perhaps not entirely eliminated.[75]

The Conference report, adopted by both Houses, contained the present language of section 802, which, instead of expressly authorizing

[73] *Hearings on H.R.* 9738 before the House Committee on Interstate and Foreign Commerce, 75th Congress, 3rd Sess., at 36-41.
[74] 83 *Congressional Record* 6853, 6854, 6858 (May 13, 1938).
[75] *Id.*, at 6858. It may be noted that Senator Pittman had previously signed, as the Delegate of the United States, the International Silver Agreement of 1933, which was not submitted to the Senate as a treaty and which was brought into force by the action of the President alone. 4 Trenwith, *Treaties*, 5507, 5516.

the Secretary of State to make agreements, merely requires him to "advise the Board of, and consult with the Board concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services." [76] The history of Section 802 thus confirms the conclusion that the term "agreements" refers to instruments other than "treaties" and means or includes executive agreements.

Despite Senator Pittman's remarks, which did not necessarily represent anyone's opinion but his own, and Senator White's reference to the powers of the Senate, which apparently was not intended to deny the existence of an executive agreement-making power, the legislative history of the Civil Aeronautics Act of 1938 seems to warrant the following conclusions:

(1) The Act was not specifically intended to confer upon the Executive an agreement-making power which he did not previously have.

(2) The term "agreement" in Sections 802 and 1102 refers to, or includes, executive agreements.

(3) The legislators were aware that among the executive agreements then in existence or in contemplation were agreements by which the United States undertook to grant admission to the air carriers of certain foreign countries, for either non-scheduled or scheduled commercial services, as the case may have been.

(4) The Act was not intended to discontinue or limit the practice of making executive agreements such as those described in the paragraph just preceding, but by reference to "agreements" in Sections 802 and 1102 in effect recognized the practice and acquiesced in its continuance. Congress recognized that by executive agreements of the above-described type the United States had assumed, and could assume, certain obligations, and directed the Board to exercise its functions consistently with such obligations. No distinction was intended to be made in this respect between bilateral and multilateral agreements.

(5) It was probably not the intention of Congress to acquiesce in the making of executive agreements by which the United States would undertake to permit foreign air carriers to operate without compliance with the procedural requirements of Section 402, including the requirement that there be in force a foreign air carrier permit issued by the Board authorizing such operation. None of the air transport agreements made by the United States contains such an undertaking.

These conclusions support and strengthen the conclusions previously drawn from the language of the Act and its judicial construction.

Practice Under the Civil Aeronautics Act

In practice, the passage of the Act seems to have resolved any doubts that the Executive branch may have had as to the propriety of entering

[76] *Congressional Record* 8864.

into air transport agreements. Such agreements, containing undertakings to grant operating privileges to foreign airlines, were concluded by the Executive with France on July 15, 1939,[77] and with Canada on August 18, 1939.[78] It may be noted, further, that the making of air navigation agreements which might be construed as granting to foreign non-scheduled air service operators the privilege of entry without specific prior authorization likewise continued. Air navigation agreements of this type were made with Canada on July 28, 1938,[79] and with France on July 15, 1939.[80] No such agreements, however, appear to have been made since the outbreak of World War II. The Chicago Interim Agreement of December 7, 1944, contained no comparable provisions.[81]

Although the making of executive agreements on air transportation after the passage of the Civil Aeronautics Act constituted practical construction of the Act by the Department of State, presumably with the approval of the President, the Civil Aeronautics Authority conceived some doubts as to the legal status of such agreements and requested an opinion from its General Counsel (L. Welch Pogue, who later became Chairman of the Board), which was rendered on October 18, 1939.[82]

In the opinion of the General Counsel, no executive agreement, as distinguished from a treaty, could be made which would have "the legal effect of dispensing with the notice and hearing, and the exercise of the Authority's judgment, called for by section 402 of the Act." This conclusion evidently is not contrary to the practice of making executive agreements containing general undertakings to admit foreign airlines, but not dispensing with the procedure of issuing permits under section 402 to individual carriers. "The exercise of the Authority's judgment" (which, in view of Section 801, is of merely advisory value) is not necessarily prevented by this practice. In the reasoning leading to this conclusion, however, some extreme statements of doubtful soundness were made which would lend support to the view that no executive agreements by which the United States undertook to admit foreign air carriers could be validly made. These statements, apparently based on the belief, contradicted by the the legislative history of the Act, that Congress had not contemplated the making of such executive agreements as distinguished from agreements on general "freedom of innocent passage," etc., included the prediction that it might be difficult to persuade foreign governments to enter into such agreements because "such moral obligation as might be created by such an

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[77] EAS 153.
[78] EAS 159.
[79] EAS 129.
[80] EAS 152; cf. agreement with Liberia of June 14, 1939, EAS 166.
[81] EAS 469; but cf. Article 5 of the Chicago International Civil Aviation Convention ratified as a treaty, TIAS 1591.
[82] For the text of this Opinion Memorandum see *Senate Doc. No.* 173, 79th Congress, 2d sess., at 6 et seq. Printed also in *Hearings on Executive A, Convention on International Civil Aviation*, before the Senate Committee on Foreign Relations, 79th Congress, 1st sess., at 49 et seq., and in *Hearings on S.* 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 206 et seq.

agreement could not possibly be binding upon any President other than the one making it," a prediction belied by the subsequent history of the negotiation of such agreements. It will suffice to note here that these statements were not reiterated by the Civil Aeronautics Board in any of its opinions.[83]

The making of executive air transport agreements was resumed in December, 1944, and has continued since.[84] There is ample justification for the policy of not resorting to the treaty-making procedure in the negotiation of international arrangements on air transportation. Since such arrangements usually contain specific provisions for services on particular routes and between particular terminals, they must be flexible and subject to modification without much delay. Many of the agreements made by the United States in recent years have already been amended, in some instances repeatedly.[85] The difficulties that would have arisen had the attempt been made to use the treaty-making procedure are indicated by the time required for the making of treaties concerning aviation. The Havana Convention on Commercial Aviation, signed on February 20, 1928, was not approved by the Senate until February 20, 1931;[86] the International Sanitary Convention for Aerial Navigation, signed on April 6, 1934, was approved by the Senate on June 5, 1935;[87] the Chicago Convention, opened for signature on December 7, 1944, was approved by the Senate only on July 25, 1946;[88] the Convention on International Recognition of Rights in Aircraft, signed on June 19, 1948, was not approved by the Senate until August 17, 1949, although there was not opposition.[89]

By the end of World War II the United States was in a uniquely advantageous position with respect to international air transportation. It alone had adequate numbers of modern transport aircraft to inaugurate almost immediately a world-wide network of commercial services. Airways equipped with the most up-to-date communication facilities

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[83] For further discussion of the views of the Board as to the validity and legal effect of the air transport agreements, see *infra*.

[84] For a list of such agreements see *supra* n. 1.

[85] Thus, the agreement of 1939 with Canada, EAS 159, was modified, supplemented, or renegotiated in 1940 (EAS 186), 1943 (EAS 314), 1945 (EAS 457), 1947 (TIAS 1619) and 1949 (TIAS 1934). The Bermuda Agreement with the United Kingdom, signed on February 11, 1946 (TIAS 1507), was modified in 1946-1947 (TIAS 1640), 1947 (TIAS 1641) and 1948 (TIAS 1714). Other agreements that have been amended include the following: Denmark, 1944 (EAS 430), amended in 1945 (TIAS 1519); France, 1946 (TIAS 1679), amended in 1950 (PR No. 819); Iceland, 1945 (EAS 463), amended in 1945 (TIAS 1621); Ireland, 1945 (EAS 460), amended in 1947 (PR No. 457); Italy, 1948 (TIAS 1902), amended in 1950 (TIAS 2081); Philippines, 1946 (TIAS 1577), amended in 1948 (TIAS 1844); Portugal, 1945 (EAS 500), amended in 1947 (TIAS 1656); Spain, 1944 (EAS 432), amended in 1950 (PR No. 680); Sweden, 1944 (EAS 431), amended in 1945 (TIAS 1550); Switzerland, 1945 (TIAS 1576), amended in 1949 (TIAS 1929).

[86] *U.S. Treaty Series* 840; 47 Stat. 1901.

[87] *U.S. Treaty Series* 901; 49 Stat. 3279.

[88] TIAS 1591. In the meantime a provisional international civil aviation organization had been set up under the Chicago Interim Agreement accepted by the United States as an executive agreement. EAS 469.

[89] 95 *Congressional Record* 11645, 11647 (August 17, 1949).

and navigational aids, and manned by U. S. Army and Navy personnel, extended through many countries to most parts of the world. The need for means of fast transportation and communication had been accentuated by the destruction of many surface transportation facilities and by the relief requirements in many parts of the world. The United States was in a strong bargaining position, with immense quantities of surplus war material available for disposal, and with many nations in need of financial assistance. American air carriers thus had incomparable opportunities for entrenching themselves in international air transportation. These opportunities could be fully utilized only through obtaining commercial operating rights in a large number of countries on a reciprocal basis. The multilateral Air Transport Agreement, sponsored by the United States at the Chicago Conference, had a cool reception and would not have sufficed to open the skies of the world to United States airlines. The bilateral air transport agreements, on the other hand, negotiated while the United States was in a superb bargaining position, have opened to American-flag air carriers a majority of the European nations, as well as most of the desirable routes elsewhere. This could not have been achieved through the slow process of treaty making.

The policy considerations in favor of the executive-agreement procedure have been well summed up by the President's Air Policy Commission:

> *Executive agreements vs. treaties.* Past experience has proven that executive agreements are better than treaties for covering international air transport rights. It is only because the Department of State, working closely with the Civil Aeronautics Board, effectively negotiated bilateral agreements with some 34 nations that we have a world-wide pattern of operating rights. These agreements came into effect upon signature, thus permitting immediate inauguration of services. Treaties would have required ratification in most instances by the legislative bodies of the two signatory states. The inevitable delay in getting the ratification of 34 treaties would have kept our air lines out of action so long that foreign competitors would have had a commanding leadership from the start. Due to prompt action on our part, that leadership is now ours.
>
> Because of changing conditions, it will almost certainly be necessary to amend the existing agreements with various countries from time to time. We should not incur the risks we would run from delay if these agreements were in treaty form and could be amended only by the treaty process.[90]

The Department of State has repeatedly stated the view that executive agreements, either bilateral or multilateral, providing for recipro-

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[90] *Survival in the Air Age, A Report by the President's Air Policy Commission* (1948), 119-120. See, to the same effect, letters from the Secretary of State, the Secretary of Commerce, and the Chairman of the Civil Aeronautics Board printed in *Hearings on S.* 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 338-341.

cal granting of operating privileges, could be validly made, apparently on the ground that such agreements are authorized by statute.[91]

Attorney General Clark, in a letter to the Secretary of State dated June 18, 1946,[92] upheld the validity of existing commercial aviation agreements to which the United States was a party as made by the President "under the authority vested in him by the Constitution and statutes, including the Civil Aeronautics Act of 1938." After briefly reviewing the pertinent provisions of the Act (Sections 801, 802, and 1102), the Attorney General stated that these provisions "make it clear that the Congress contemplated the consummation of agreements with foreign nations relating to international civil aviation." He concurred in the position taken by the Department of State that "the jurisdiction of the Civil Aeronautics Board in connection with the granting of permits is not affected by any of the civil-aviation agreements which have been concluded, and that the Board in each case must still decide whether the applicant carrier is a suitable air line for performance under the requested permit and whether the issuance of the permit would meet the other requirements of the statute;" and also that the Board under Section 1102 must act "consistently with any obligation assumed by the United States" in an agreement with a foreign nation, "and, therefore, within the broad policy declared in the agreement," the ultimate decision, under Section 801, being made by the President.

As already indicated, the Board had some doubts in 1939 about the legal position of executive agreements which purported to bind the United States to grant operating privileges to foreign air carriers. It has never made its own, however, the more extreme negative views expressed in the Opinion Memorandum of the General Counsel dated October 19, 1939.[93] The attitude of the Board appears to be as follows:

(1) The Board recognizes the validity of executive agreements by which the United States undertakes to grant operating privileges to foreign airlines, and considers such agreements to be binding on the United States.[94]

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[91] See, e.g., letter of Acting Secretary of State Grew to Senator Bilbo, June 9, 1945, 12 *Department of State Bulletin* 1101 (1945); testimony of Edward G. Miller, Assistant to the Under Secretary of State, in *Hearings on S.* 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 132, 140-141, and letter of the Secretary of State, *id.*, at 338; and testimony of J. Paul Barringer, Deputy Director, Office of Transport and Communications, Department of State, in *Hearings pursuant to S. Res.* 50 before the Senate Committee on Interstate and Foreign Commerce, 81st Congress, 1st sess., at 1485 et seq.

[92] 40 Op. A.G. 451 (1946). Printed also in *Sen. Exec. Rep. No.* 8, 79th Congress, 2d sess., June 19, 1946, at 6-7; and in 15 *Department of State Bulletin* 1070 (1946).

[93] See *supra* n. 82.

[94] *Trans-Canada Air Lines, Montreal-New York Service,* Serial E-4019, decided March 14, 1950, approved March 29, 1950, at 5, on the authority of the opinion of the Attorney General, *supra* n. 92. See also, for example, *Airways (Atlantic) Limited,* 2 C.A.B. 181, 187 (1940); *Trans-Canada Air Lines, Toronto-Buffalo-New York Route,* 2 C.A.B. 616, 618 (1941); *Northwest Airlines, Inc., Additional Service to Canada,* 2 C.A.B. 627, 630 (1941); *Canadian Colonial Airways, Ltd.,* 3 C.A.B. 50, 55, 64 (1941); *Swedish Intercontinental Airlines (S.I.L.A.),* 6 C.A.B. 631, 632-633 (1946); *Royal Dutch Air Lines (KLM),* 6

(2) Although the Board has never acted inconsistently with what it has understood to be the obligations of the United States under any agreement, and has on many occasions pointed out that the action it took was consistent with such obligations,[95] it has taken the position that there is nothing in Section 1102 "which dispenses with the requirement of section 402 (b) that we find that the services to be operated . . . are required by the public interest and that such carrier is fit, willing, and able to perform such services."[96] It has refrained from holding that the obligation contained in an executive agreement is conclusive upon it on the issue of the public interest or on the issue of an applicant's fitness, willingness and ability, and has been careful to set forth in its opinions the data in the record tending to support the conclusions that the proposed service is in the public interest and that the applicant is fit, willing, and able to perform it. In the case of the application of three Venezuelan airlines for permits, at a time when both the United States and Venezuela were parties to the Chicago Air Transport Agreement, the Board posed the question whether the Agreement required the contracting parties to "give each other any number of routes upon which the five freedoms are to be exercised . . . and to permit all carriers from any contracting state to exercise those freedoms on such routes as may be granted to any contracting state," and said: "To answer these questions in the affirmative, in our judgment, would mean that this executive agreement would override the statutory provisions of section 402 of the Civil Aeronautics Act of 1938, and possibly also section 801. Serious doubt exists as to whether executive agreements can be given such an effect. But we do not find it necessary to decide this issue, because we believe that a proper interpretation of the Air Transport Agreement does not lead to such an affirmative answer."[97] Two chairmen of the Board have

C.A.B. 815 (1946); *Aerovias Nacionales de Colombia, S.A.*, 7 C.A.B. 149 (1946), and particularly the concurring opinion (necessary for the decision) of Member of the Board Young, *id.*, at 155; *Linea Aerea Taca de Venezuela, C.A.*, 7 C.A.B. 317 (1946); *Scandinavian Airlines System*, 8 C.A.B. 676, 679-680 (1947); *Servicos Aereos Cruzeiro do Sul, Ltda, Brazil-United States Service*, Serial E-3896, decided December 22, 1949, approved February 8, 1950. See, further, letter from L. Welch Pogue, Chairman of the Civil Aeronautics Board, May 10, 1946, *Hearings on S.* 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 340. The Board and its members have extensively participated in the negotiation and making of air transport agreements. See, e.g., C.A.B., *Annual Report*, 1946, at 7. The Chairman and Vice Chairman of the Board were members of the United States Delegation at the Chicago Conference of 1944 at which the multilateral Air Transport Agreement was made (see *International Civil Aviation Conference, Final Act and Related Documents*, Department of State Publication 2282 (1945), at 30), and all five members of the Board participated in the Bermuda Conference of 1946 at which the bilateral agreement with the United Kingdom was made (TIAS 1507).

[95] See, e.g., *Airways (Atlantic) Limited*, 2 C.A.B. 181, 187 (1940); *British Overseas Airways Corporation*, 2 C.A.B. 763, 768 (1941); *Scandinavian Airlines System*, 8 C.A.B. 676, 680 (1947); *Servicos Aereos Cruzeiro do Sul, Ltda, Brazil-United States Service*, *supra* n. 94, at 4.

[96] *Trans-Canada Air Lines, Toronto-Buffalo-New York Route*, 2 C.A.B. 616, 618 (1941). In *Trans-Canada Air Lines, Montreal-New York Service*, *supra* n. 94, at 4-5, the Board said: "We have consistently held that an applicant must meet the tests set up in section 402(b) of the Act before it can be granted a foreign air carrier permit."

[97] *Linea Aerea Taca de Venezuela, C.A.*, 7 C.A.B. 317, 320 (1946).

made statements of a somewhat equivocal nature. In 1946, L. Welch Pogue, in his testimony before the Senate Committee on Foreign Relations, said: "If there is any difference in emphasis between myself as general counsel and myself as Chairman of the Board it is that in passing upon a standard of public interest under section 402 I would be legally right in saying that I found the public interest but I paid great weight, practically compelling weight, to any interational agreement that may be in force, to which I am referred by section 1102: and then again I do not want to overburden or overplay this point."[98] In 1949, Joseph J. O'Connell, Jr., testifying before the Senate Committee on Interstate and Foreign Commerce, took a similar position, and stated, in effect, that he would consider an executive agreement practically, but not completely, controlling. He indicated that the Board in at least one case had had doubts about the fitness, willingness, and ability of an applicant under a bilateral agreement to fly the route, and had given the matter "long and careful consideration."[99] Referring to this testimony, the Board subsequently said: "It is apparent from an examination of the Chairman's testimony that he did not state that an air transport agreement was absolutely binding."[100]

It is submitted that the Board's position on the legal effect of obligations assumed by the United States in an executive agreement is needlessly ambiguous. The existing air transport agreements do leave, of course, considerable discretion to the Board acting under the direction of the President, as already pointed out, and do not purport to dispense with the procedure prescribed by Section 402. There could be no quarrel with the Board's mentioning this fact. It is believed, however, that the Board cannot, in view of the language of Section 1102 of the Act, combine a recognition of the validity of the executive agreements with a refusal to regard the obligations contained in such agreements as binding upon it. Section 1102 directs the Board to give an overriding effect to the policy of compliance with the international obligations of the United States. The Board might be justified in departing from this policy, if at all, only if it were specifically directed to do so by the President under Section 801.

The Board has not been entirely consistent in its practice as to the weight to be attached to the policy expressed in an executive agreement. In the case of *Trans-Canada Air Lines, Toronto-Buffalo-New York Route,*[101] the Board refused to consider evidence bearing on the application of Trans-Canada Air Lines for a permit for a Toronto-Buffalo service on the ground that "it would be contrary to the public interest for us to grant an authorization to a Canadian company for services which it was contemplated by the agreement would be given

[98] *Hearings on Executive A, Convention on International Civil Aviation,* before the Senate Committee on Foreign Relations, 79th Congress, 1st sess., at 135-136. See also *id.,* at 141.

[99] *Hearings pursuant to S. Res.* 50 before the Senate Committee on Interstate and Foreign Commerce, 81st Congress, 1st sess., at 1497-1500.

[100] *Trans-Canada Air Lines, Montreal-New York Service, supra* n. 94, at 4.

[101] 2 C.A.B. 616 (1941).

to an American carrier . . ."[102] The Board thus based its finding as to the public interest in this instance solely on the terms of the executive agreement with Canada, although its finding in the same case that a Toronto-New York service by Trans-Canada would be in the public interest was buttressed by recital of supporting evidence extraneous to the executive agreement which had allocated this route to a Canadian carrier. Since both affirmative and negative decisions of the Board with respect to applications for foreign air carrier permits are subject to the provisions of Sections 801, 1006 (a) and 1102 of the Act, it is not perceived why the Board did not feel free to consider the executive agreement as conclusive a basis for an affirmative as for a negative finding as to the public interest.[103] In 1946, the Board disapproved, as being adverse to the public interest, an agreement between TWA and Air France on schedules and rates submitted for its approval under Section 412 of the Act, on the sole ground that the executive agreement between France and the United States fully covered the matters dealt with in the inter-company agreement and "that any agreement which contains provisions which impose or might impose restrictions which are greater than or different from those provided by a governmental agreement, is contrary to established public policy as set forth in the governmental agreement and consequently adverse to the public interest."[104] The Board has on occasion felt free to give controlling weight to one of the criteria of the public interest and public convenience and necessity set forth in Section 2 of the Act, to the exclusion of others. After finding that a proposed service was required by the needs of national defense, the Board has sometimes refused to consider evidence as to the other aspects of public convenience and necessity or of the public interest, such as commercial and postal needs, because consideration of such evidence could not have changed the decision and would have merely delayed the inauguration of the needed service.[105] If the Board believes that it is authorized to attach controlling weight, even to the exclusion of all other evidence, to the needs of national defense, which are enumerated in Section 2 on the same level as other criteria of public convenience and necessity and of the public interest, it is hard to understand why it has hesitated to attach at least as much weight to the policy of compliance

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[102] *Id.*, at 618.

[103] As already pointed out, any loss resulting to an American air carrier from the issuance of a foreign air carrier permit may be compensated by mail pay. *Supra*, n. 63.

[104] *Agreements Between Reseau des Lignes Aeriennes Francaises (Air France) and Transcontinental & Western Air, Inc.*, 7 C.A.B. 163, 165 (1946). Section 412, unlike Section 402, does not require the Board to hold hearings, but it clearly contemplates an exercise by the Board of its judgment as to whether the inter-company agreement is in the public interest. Decisions of the Board under Section 412, unlike those under Section 402, are not subject to the approval of the President.

[105] *Pan American Airways Company, United States-Africa Service*, 3 C.A.B. 47 (1941); *Taca, S.A. (El Salvador)*, 3 C.A.B. 234 (1941). A service to Africa via Ascension Island was authorized in 1946 for reasons of national defense, although the evidence indicated that the expense of the maintenance of the route would not be otherwise justified. *American Overseas Airlines, Inc., et al., South Atlantic Routes*, 7 C.A.B. 285, 304-305 (1946).

with the international obligations of the United States, as it is clearly directed by Section 1102 to do.[106]

The doubts of the Board led it to state in its Annual Report for 1942 that the effect of executive agreements "upon the powers and duties of the Board under Section 402 of the Act is not clear," and to recommend that Congress amend Section 402 "so as to (1) provide that the Board may regard an obligation assumed in an agreement between the United States and a foreign country relative to the establishment of foreign air transportation services as sufficient evidence to support a finding that such service will be in the public interest; and (2) to relieve the Board of the necessity of finding in such a case that the applicant for the service is fit, willing and able to perform the air transportation involved."[107] A provision of this type (which would have also dispensed with hearings in cases covered by the agreements) was included in H.R. 1012 introduced in the 78th Congress, 1st session, and was termed by the House Committee on Interstate and Foreign Commerce "a clarifying amendment,"[108] but was omitted from the revised version of the bill (H.R. 3420).[109]

Criticism in Congress

Misgivings were voiced in Congress over the Chicago Air Transport Agreement of 1944 and the Bermuda Agreement of 1946 with the United Kingdom, and the propriety of making multilateral agreements such as the Chicago Air Transport Agreement was extensively discussed in 1945 during the hearings on the Chicago Convention.[110] In 1946, a bill designed to curb the President's power to enter into executive agreements on air transportation was introduced by Senator McCarran (S. 1814), and hearings on it were held in the Senate Committee on Commerce.[111] The Committee, by a majority of 17 to 1, adopted on April 15, 1946, a resolution in which it declared that agreements

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[106] It is to be noted that the Board has pointed out that the enumeration of the criteria of the public interest in Section 2 is not exhaustive, as indicated by the use of the expression "among other things." *American President Lines, Ltd., et al., Petition*, 7 C.A.B. 799, 802 (1947). The Board has mentioned as being among the criteria of the public interest "the desirability of maintaining the existing cordial relations between the two countries," *Aerovias Nacionales de Colombia, S.A.*, 7 C.A.B. 149, 154 (1946); has said that even in the absence of an agreement the granting of a permit may be required by "principles of international reciprocity," *Compania Cubana de Aviacion, S.A.*, 6 C.A.B. 807, 811 (1946); and has issued temporary permits to Mexican air carriers authorizing them to use border airports in the United States when the adjoining Mexican airports were unserviceable because it was "in accord with the good neighbor policy of the United States," *Aero-Transportes, S.A.*, 6 C.A.B. 159, 161 (1944), and *id.*, 383, 385 (1945); see also *Lineas Aereas Mexicanas, S.A.*, 6 C.A.B. 165 (1944) and 299 (1945).

[107] C.A.B., *Annual Report*, 1942, at 15-16.

[108] *House Report No.* 124, 78th Congress, 1st sess., at 13.

[109] *House Report No.* 784, 78th Congress, 1st sess.

[110] *Hearings on Executive A, Convention on International Civil Aviation*, before the Senate Committee on Foreign Relations, 79th Congress, 1st sess.

[111] *Hearings on S.* 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess. Identical bills were introduced in the 80th Congress (S. 11) and in the 81st Congress (S. 12). See *infra*, n. 118.

such as the Bermuda Agreement were not binding on the United States and should not be made except in the form of treaties approved by the Senate.[112] This resolution, which was not brought to the floor of the Senate for discussion or vote, had, of course, no legal effect and did not succeed in dissuading the Executive from continuing to make bilateral agreements similar to the Bermuda Agreement.[113] Opposition in the Senate was partly responsible, however, for the withdrawal of the United States from the Chicago Air Transport Agreement.[114]

The Congressional Aviation Policy Board, in its Report,[115] "recognized that the executive agencies are in a position to designate routes in bilateral agreement negotiations," but recommended that "more effective machinery should be set up in the State Department and the Civil Aeronautics Board, by legislation if necessary, to govern such procedures and insure full protection of the Government and of the United States flag international carriers."

The agreement of June 4, 1949, with Canada,[116] whereby the United States undertook to permit a Canadian airline to fly the Montreal-New York route, led to renewed agitation in the Senate against the practice of making executive agreements containing such undertakings. During June, 1949, in the hearings on the problems of the airline industry the propriety of this practice was again discussed and doubted.[117] In a letter to the President dated July 28, 1949, forty-nine Senators, later joined by some others, criticized the methods and results of the negotiations with Canada, but did not challenge the validity of the agreement. The Senate Committee on Interstate and Foreign Commerce reported a bill (S. 12) which would amend Section 802 of the Civil Aeronautics Act by adding the following language:

> No agreement with any foreign government restricting the right of the United States or its nationals to engage in air-transport operations, generally granting to any foreign government or its nationals or to any air line representing any foreign government any right or rights to operate in air transportation or air commerce other than as a foreign air carrier in accordance with the provisions of the Civil Aeronautics Act of 1938, or respecting the formation of or the participation of the United States in any international organization for regulation or control of international aviation or any

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[112] *Senate Doc. No.* 173, 79th Congress, 2d sess. The Committee specifically adduced in support of its views only two authorities—Professor Borchard (on the general constitutional question) and the Opinion Memorandum of the General Counsel of the Civil Aeronautics Authority, *supra* n. 82.

[113] An agreement with Egypt was signed on June 15, 1946, TIAS 1727, and eight other such agreements were made during the balance of the year. The President upheld the validity of such agreements in his message to the Senate on June 11, 1946, in which he urged approval of the International Convention on Civil Aviation made at Chicago. 14 *Department of State Bulletin* 1079 (1946). For the opinion of the Attorney General dated June 18, 1946, see *supra* n. 92.

[114] See *supra* n. 26.

[115] *National Aviation Policy*, Report of the Congressional Aviation Board pursuant to Public Law 287, 1948, Senate Rep. No. 949, 80th Congress, 2d sess., at 27.

[116] *Supra*, nn. 3 and 6.

[117] *Hearings pursuant to S. Res.* 50 before the Senate Committee on Interstate and Foreign Commerce, 81st Congress, 1st sess., at 1473-1521.

> phases thereof, shall be made or entered into by or on behalf of the Government of the United States except by treaty.[118]

This bill, which is identical with bills introduced in the 79th and 80th Congresses, is apparently intended, in the view of its proponents and some of its opponents, to prevent the making of executive agreements on air transportation such as are now in existence, by requiring that all such agreements be submitted to the Senate for approval as treaties.[119] Actually, it is clear that the language of the bill would accomplish no such purpose, for the following reasons:

(1) None of the existing air transport agreements purports to restrict "the right of the United States or its nationals to engage in air-transport operations." Under international law, there is no right to engage in air transport operations in foreign territory without the consent of its sovereign. The air transport agreements, far from restricting any such non-existent "right," provide for the granting by foreign states of privileges to United States airlines which they might not otherwise obtain.

(2) None of the existing air transport agreements, as possibly distinguished from some air navigation agreements, purports to exempt any foreign government or airline from the necessity of qualifying as a foreign air carrier under the Act if it wishes to operate air transport services to the United States.[120]

(3) The United States is not now a party to any executive agreement respecting the formation of, or participation in, any international organization for regulation or control of international aviation or any phases thereof.[121]

There is serious doubt that Congress can effectively restrict the authority of the President to enter into executive agreements insofar as this authority rests upon the President's inherent power to conduct the foreign relations of the United States.[122] It is believed, however, that Congress, in the exercise of its constitutional powers over foreign commerce and other matters, may by statute make the obligations con-

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[118] S. 12, and *Senate Rep. No.* 482, 81st Congress, 1st sess.

[119] *Senate Rep. No.* 482, 81st Congress, 1st sess., at 7. As this article was going to press, the Senate, on December 15, 1950, passed the bill after it had been called on the consent calendar. S. 12 has been reintroduced in the 82nd Congress.

[120] Cf., however, provisions permitting foreign airlines to fly non-stop over United States territory, such as are found in the Air Services Transit Agreement made at Chicago, EAS 487, and in the air transport agreement with France, Article VII, TIAS 1679. Cf. Section 6(c) of the Air Commerce Act as amended by Section 1107(e)(5) of the Civil Aeronautics Act, and Section 1(3) of the latter. See Wiprud, *supra* n. 48, at 264 et seq.; Latchford, article in 12 *Department of State Bulletin* 1104 (1945).

[121] The provision in S. 12 on this point is clearly an anachronism inherited from the bill introduced in the 79th Congress, when the United States took part by executive agreement in the Provisional International Civil Aviation Organization, replaced in 1947 by the present organization under the Chicago Convention approved by the Senate as a treaty, TIAS 1591.

[122] See letters from the Department of State and the Department of Justice, *Senate Rep. No.* 482, 81st Congress, 1st sess., at 11, 12.

tained in executive agreements on air transportation unenforceable in the United States, as by prohibiting the entry of foreign aircraft. If the authority to make such agreements is regarded as resting solely on statute — hardly a tenable view — Congress may withdraw such authority, without necessarily terminating the agreements made while the authority existed.[123]

The International Position of Executive Agreements

What is the international legal position of the executive agreements on air transportation? There is no indication that the parties to such agreements, including the Government of the United States, have taken the view that they are anything but valid international agreements containing obligations binding upon both parties.[124] The view frequently asserted by the opponents of these agreements that executive agreements are only "morally" binding, if at all, and then only for the duration of the term of office of the President who has made them,[125] is a myth that finds no support whatever in the practice or official utterances of the Government of the United States, and is not in consonance with the general principle of interational law that international agreements create obligations for states and not merely for individual officials.[126] There is more support in practice for the position that an executive agreement authorized by statute is terminated by the passage of inconsistent legislation. Thus, in 1894 Brazil was notified that an Act of Congress had the effect of immediately terminating a reciprocal trade agreement which provided for termination on notice. Secretary of State Gresham pointed out, in

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[123] Cf. the testimony of Edward G. Miller, of the Department of State, in *Hearings on S.* 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 132 et seq.

[124] On the views of C.A.B., see *supra n.* 94. The preamble of the agreement with India signed on November 14, 1946, TIAS 1586, refers to the contracting governments as "parties to the Interim Agreement on International Civil Aviation and the International Air Services Transit Agreement, both signed at Chicago on the seventh day of December, 1944, the terms of which agreements are binding on both parties." Although the agreements referred to, which were accepted as executive ageements by the United States, EAS 469 and EAS 487, are not "air transport" agreements, there is no reason to believe that a different attitude would be taken toward the latter by the Department of State.

[125] See, e.g., Opinion Memorandum of the General Counsel of the Civil Aeronautics Authority, *supra* n. 82, and *Senate Rep. No.* 482, 81st Congress, 1st sess., at 6 (apparently on the authority of Professor Borchard, cf. his *Opinion, supra* n. 8, at 66).

[126] See McDougal and Lans, *supra* n. 8 at 331 et seq., esp. 346, and sources there cited. Many executive agreements have been not terminable under their own provisions within the Presidential term in which they were made. Thus, the air transport agreement with France of July 15, 1939, EAS 153, was terminable on two years' notice—i.e., not before the expiration of the Presidential term in which it was made. The agreement of April 6, 1939, between the United States and Great Britain, EAS 145, established joint control over Canton and Enderbury Islands for a period of fifty years. It may be within the intention of the parties to an agreement that it should be terminable at will or on the occurrence of a certain condition, but such an intention cannot be implied from the mere fact that the agreement has been made by executive authority. Cf. 5 Hackworth, *Digest of International Law*, 430-433. The position that the United States may assume obligations by executive agreements was evidently taken by Congress in Section 1102 of the Civil Aeronautics Act of 1938. See *supra*.

justification, that the agreement had been negotiated subject to the terms of United States and Brazilian legislation which "were well known to the executive departments of both Governments, and were recognized by them as the basis of their action."[127] This practice may be explained as being based on a claim of implied consent of both parties to the termination of the agreement by the passage of inconsistent legislation. It is by no means clear, however, that other governments have assented to such a claim, or that the governments with which air transport agreements have been made have in fact impliedly consented to their termination by the passage of inconsistent legislation. All of the existing air transport agreements provide in terms for termination on notice.

Even a holding by some competent organ to the effect that the air transport agreements have not been made by proper constitutional authority might not suffice to release the United States automatically from the international obligations which they purport to contain. The international legal effect of treaties or agreements made by or at the direction of a head of state or a foreign minister ostensibly on behalf of his state but without authority in the law of the state has been a subject of much controversy in the literature of international law.[128] The Permanent Court of International Justice, in the *Eastern Greenland* case between Denmark and Norway, referring to an oral statement made by the Norwegian Minister for Foreign Affairs to the Danish Minister to the effect that the Norwegian Government would not make any difficulties for Denmark in the settlement of the question of Danish sovereignty over the whole of Greenland, considered it "beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs," although Norway had earnestly contended that the Minister had no constitutional authority to enter into such a commitment.[129] Several of the legal officers of the Department of State have expressed the view that the United States might be internationally bound by executive agreements even if made in excess

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[127] *U.S. Foreign Relations*, 1894, 77, 79-82, at 80. Cf. similar action with respect to France in 1909, with perhaps less specific justification, 5 Hackworth, *Digest of International Law*, 429-430; *U.S. Foreign Relations*, 1909, 248-254.

[128] See Harvard Research in International Law, *Draft Convention on the Law of Treaties, with Comment*, 29 Am. J. Int. L., Supplement, 992-1009 (1935); Fairman, "Competence to Bind the State To An International Engagement," 30 Am. J. Int. L. 439 (1936); 5 Hackworth, *Digest of International Law*, 154-158; McNair, *The Law of Treaties: British Practice and Opinions* (1938), 38-46; Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed., 1945), 1383-1386; McDougal and Lans, *supra* n. 8, at 323-331.

[129] Permanent Court of International Justice, *Publications*, Series A/B, No. 53, at 70-71; see also the opinion of Judge Anzilotti, dissenting on other grounds, *id.*, at 91-92; cf. *id.*, Series C, No. 62, at 545 et seq., No. 63, at 876 et seq., and 1411 et seq.

of authority.[130] This view is in consonance with the position taken much earlier that a foreign government is not entitled to go behind the President's assertion of authority or to question it.[131] In practice, a Foreign Office cannot and does not study the constitutional law of all the nations with whose governments it deals; it must necessarily rely to a large extent upon the representations and assertions of power made by the recognized spokesmen for such nations. In the United States, the President speaks for the nation in all matters pertaining to foreign relations. It would be difficult for the United States to deny that a foreign government might justifiably rely upon the authority of the President to enter into binding commitments on air transportation by executive agreement, in view of the long-continued practice of making and carrying out executive agreements on a large variety of subjects, the absence of any decisions to the contrary, the apparent approval of the practice by all three branches of the Government, and the part performance of most such commitments by one or both of the parties.

Conclusions

(1) The practice of making executive agreements on air transportation is a constitutional usage which does not rest upon statutory authority, but which has been recognized, acquiesced in, and in effect approved by Congress.

(2) The United States may assume valid international obligations in bilateral or multilateral executive agreements on air transportation, including obligations to grant operating privileges to foreign air carriers, normally terminable only by express or implied consent of the parties.

(3) The Civil Aeronautics Board, in the performance of its powers and duties under the Civil Aeronautics Act of 1938, including Section 402, is under a statutory duty not to take any action which would result in a breach of any obligation assumed by the United States in an executive agreement, but it is possible that it may be excused from the performance of its duty by specific direction of the President acting under Section 801 of the Act.

(4) Congress has the power to prevent, by appropriate legislation, the performance by the United States of obligations assumed in executive agreements on air transportation.

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[130] Memorandum of the Solicitor for the Department of State Clark, January 14, 1911, 5 Hackworth, *Digest of International Law*, 393; testimony of Green H. Hackworth, Legal Adviser of the Department of State, 1944, *Hearings on S.* 1385 before a Subcommittee of the Senate Committee on Commerce, 78th Congress, 2d sess., at 230. *Semble contra*, testimony of Edward G. Miller, of the Department of State, 1946, *Hearings on S.* 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 132, 142-143.

[131] Secretary of State Jefferson to M. Genet, November 22, 1793, 4 Moore, *Digest of International Law*, 680; Secretary of State Foster to the President, December 7, 1892, citing the action of Secretary of State Seward in 1865 with respect to the withdrawal of a notice of termination of the arrangement of 1817 with Great Britain concerning armaments on the Great Lakes, 5 *id.* 169-170.

AIR TRAFFIC FORECASTING FOR THE NEW YORK–NEW JERSEY PORT DISTRICT — PART II*

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INTRODUCTION AND METHODOLOGY

THE Port of New York Authority's air traffic forecast, completed last summer after almost eighteen months of intensive research and study, projected not only the volume of air passenger traffic to be expected at airports in the New York-Northeastern New Jersey Metropolitan Area but also the anticipated volume of air cargo and mail. The preceeding article in this series discussed the preparation of the passenger traffic forecasts. The present article will describe the construction of the cargo and mail estimates.

While the broad aspects of the methodology used in estimating the three different classes of traffic were the same, significant differences in handling of the material must of necessity be expected because of the nature of the problems involved.

At the present time roughly 80 percent of airport traffic is related to passenger travel. From a practical point of view, then, airport planning in the past has centered on the passenger aspects of airport development. The size of terminal buildings, the number of aircraft movements, the requirements for highways and parking lots, and the extent of hangar and related facilities are, for the most part, functions of air passenger volume.

Since the end of World War II rapid development has occurred in the air freight field. Long a by-product of passenger transportation, air cargo bids fair to stand on its own legs as an affiliated rather than a dependent operation. If the projection of passenger traffic requires understanding and acumen as concerns both air and competing intercity transport, the projection of air mail and cargo traffic demands imagination and vision in even greater measure.

The large terminal-type airport must plan separate facilities for the reception and dispatch of mail, express and freight. Furthermore,

* Continued from Autumn issue of JOURNAL, 17 J. Air L. & Com. 379 (1950).

since the present high cost of ground handling for these classes of traffic is one of the major factors in preventing more rapid development of mail and cargo services, new freight terminal facilities must be of the most modern and efficient type economically justifiable in the light of reasonably expectable traffic volumes.

As with passenger traffic, the cargo and mail forecasts involved a review of the total surface and air market, followed by an apportionment of the traffic between the two modes of transport, and finally by an estimation of the share of the national traffic to be handled at airports in the New York Metropolitan Area. The five approaches to forecasting outlined in the previous article were employed in arriving at cargo and mail projections.

However, the limitations imposed by the infancy of the air freight industry, and its relatively small size when compared with freight transportation generally, called for the imposition of considerably different emphasis within the framework of the over-all study. Of equal importance was the provision of a forecast methodology which would permit periodic review and revision in the light of rapidly changing air cargo and parcel developments.

Domestic and Overseas Air Cargo

In 1948 air cargo carried only two-hundredths of one per cent of the vast movement of freight within the United States. By far the greatest portion of this movement consisted of raw and unprocessed materials transported in bulk at low rates.

The market for air cargo is limited to goods which have a much higher value per pound than the raw and unprocessed materials which constituted the major part of this country's freight movement. It is restricted to that minor part of the total which moves over relatively long distances. It is further limited to goods and industries where speed can be translated into marketing and distribution benefits substantial enough to offset higher rates. Shipments moving by air for emergency reasons, of course, provide exceptions to normally controlling economic factors.

Some indication of the commodities which will constitute the backbone of the air cargo market is shown by the data in Table 16. The four major scheduled airlines received 36 per cent of their freight weight in the three important machinery categories, industrial and electrical machinery and automobile parts. Textile fibers and manufactures, including apparel, produced 18 per cent and printed matter another 9 per cent of the weight. The four non-scheduled carriers had 20 per cent of their traffic in the above-mentioned machinery categories, 20 per cent in nursery and greenhouse stock, and 18 per cent in textiles. This is the character of the air freight market today although it appears

that textiles, including apparel, and nursery and greenhouse stock have increased their relative position since 1948.

TABLE 16—DOMESTIC AIR FREIGHT COMMODITY PATTERN
(Percentage Distribution of Tonnage Shipped)
1948

Commodity Group	*Four Scheduled Airlines*	*Four Non-Scheduled Airlines*
Textile Fibers and Manufactures	17.9%	17.5%
Industrial Machinery	12.3	5.6
Automobile Parts and Machinery	12.1	10.2
Electrical Machinery	12.0	3.7
Printed Matter	9.3	2.0
Nursery and Greenhouse Stock	3.8	19.7
Metals and Manufactures	3.5	1.1
All Other Shipments	29.1	40.2
Total	100.0%	100.0%

Commodities moving by rail express, parcel post, freight forwarder, less-than-truckload, and less-than-carload provide a similar pattern and give further evidence of goods most eligible for transportation by air. Important among commodities moving by parcel post and rail express are automobile equipment and parts, electric household appliances, men's and women's apparel, drugs, perfumes, and cosmetics. Industrial commodities, of which more than half of the total volume is shipped by parcel post, express or freight forwarder, include clocks, jewelry and silverware, apparel, transportation equipment, and industrial leather.

Air cargo carries each of these commodities in varying degrees. However, most of the commodities forming a substantial part of present air traffic move in even greater volume on the competing services. It is clear that the future growth of air cargo will be closely related to increasing carriage of those commodities presently moving by air and a consequent further diversion of traffic from competing services.

In addition, a substantial portion of air cargo tonnage will consist of traffic movements made possible by the speed of air transportation. For example, agricultural perishables offer a promising market for development of such traffic.

The rate of growth of air cargo volume, in large part, is largely dependent upon reductions in the cost of providing the service. The major possibility for reductions in air cargo operating costs lies in the introduction of new and more economical aircraft. Improvement of ground handling and terminal operations also offers opportunity for future savings as volume develops. Additional factors that may permit cost reductions include all-weather flying, improvements in aircraft utilization, and the establishment of less restrictive operating standards — such as higher gross take-off weights — for cargo aircraft as compared with passenger aircraft.

Terminal expenses are high for air cargo shipment because of the ground transportation cost from the downtown business area to the airport together with the rehandling of cargo which this operation requires. In this respect air transportation is to be compared with the railroads in contrast with door-to-door delivery generally possible with truck operation.

Forecast of Domestic Air Cargo

In the past twenty years there has never been a period of air cargo volume decrease. Four periods of noteworthy increases are apparent — 1931, 1935, 1941-1942, and 1946-1948. The first two, although showing pronounced percentage increases, are related to extremely small tonnage. The third resulted from war-time traffic expansion. Postwar growth, reflecting the introduction of air freight services, witnessed annual increases ranging up to almost 200 per cent. It is believed these large percentage increases will not be seen again, and the diminishing rate of growth evidenced in the last few years is expected to continue. Cargo projections have been based on a 25 per cent increase for 1950, with a decline to 4 per cent by 1980. It is expected that the average length of haul of air cargo will remain relatively stable at about 1000 miles.

The New Jersey-New York District is presently loading about 28 per cent of the nation's originated air cargo tonnage. Since such traffic initially has been more highly developed on selected high density routes, it is not likely that this District will continue to enjoy its current high share. It is anticipated that the New York-Newark share will decline to 25 per cent by 1965 and 23 per cent by 1980.

The forecast of total domestic cargo to be enplaned is shown in Table 17 together with the forecast of domestic air cargo to be handled at New York and Newark Airports.

TABLE 17—FORECAST OF DOMESTIC CARGO MOVEMENTS
(Total Tons)
1950-1980

Year	*U.S. Total Enplaned*	*Port of New York Handled**
1949	169,400	72,400
1950	211,800	88,900
1965	778,200	291,800
1980	1,517,500	523,600
Per Cent Increase 1980 over 1949	795.8%	623.3%

* Port of New York air cargo handled on an inbound, outbound, and rehandled in-transit basis.

Overseas Air Cargo Traffic

The speed advantage to be gained through moving cargo by air is much more pronounced in overseas than domestic service. In addition

to the long haul nature of overseas traffic and consequent greater differentials in in-transit times, overseas air cargo offers a much greater frequency of schedules than boat and tends to eliminate trans-shipment on cargo consigned to inland destinations. Time savings can often be measured in terms of weeks. Fewer handlings and generally better stowage conditions frequently result in savings on packaging materials, tare weight of the shipments, and claims.

Air cargo has an additional advantage in that it is the only genuine overseas express service. No such service existed in overseas trade prior to the advent of the airplane. Although this is an obvious advantage, it also stresses the need for a long term promotional program. The scheme and tempo of merchandise distribution abroad has placed little premium on speed. Historical customs barriers, export and import regulations, and foreign exchange controls have played a major part in preventing that type of closely knit industrial integration which requires speed in transit.

Despite the likelihood that introduction of new and more efficient long haul aircraft will make possible a proportionately greater reduction in overseas than domestic air cargo rates, it is anticipated that overseas rates will remain substantially higher than domestic. More important, the wide divergence between overseas air cargo and overseas steamship rate levels will continue to present a major obstacle to all but minor diversion of total overseas tonnage.

Similar again to its domestic counterpart, overseas air cargo has competed for a wide variety of types of shipment, though due to the higher rate level it has been more restricted to small, high unit value, manufactured goods. Various types of textile shipments, machinery parts, and chemicals have supplied the bulk of air cargo exports while textiles, scientific equipment, nursery stock, furs, and jewelry constitute the greater part of imports. The concentration upon small, high value shipments in overseas air cargo is confirmed by a 1948-1949 sample survey of air cargo exports from the Port of New York, which showed a 38 pound average weight per shipment and an average value per pound of $7.43. About 35 per cent of the weight and 95 per cent of the shipments were in movements of under 100 pounds. The average value per shipment was $284.00.

Overseas air cargo, a rapidly growing young industry, is similar to domestic air cargo in that both carry but a small fraction of the vast movement of goods in their respective fields. Total foreign trade of the United States from 1923 to 1940 averaged 100 million tons annually. Commodities handled in bulk, such as petroleum, coal, and iron, comprise the major part of foreign trade cargoes. Although about 28 per cent of total United States foreign trade is classified as merchandise traffic, the approximate 25¢ per pound average value of this traffic as compared with over $5.00 per pound for air cargo indicates that only a small fraction of even this tonnage can be attracted to air cargo.

As with domestic air cargo, the rapid postwar expansion of overseas air cargo has been gradually subsiding. Volume has been continuing to increase but at a decreasing annual rate. A continuation of this trend is foreseen, with a gradual decline in the annual rate of increase from 21 per cent in 1950 to 4 per cent in 1980. The 1980 forecast of United States overseas air cargo is 303,500 tons, which amounts to seven-tenths of one per cent of the prewar level of general merchandise tonnage.

The New Jersey-New York Port District currently enplanes 21 per cent of the nation's overseas air cargo tonnage. From the point of view of dollar value of air cargo, the New Jersey-New York District has consistently ranked as the major port. With increased development of the relatively new trans-Atlantic air market, it is reasonable to expect that this Port District's share of national overseas air cargo will tend to increase during the near term future. Not only were air cargo services introduced later on trans-Atlantic routes, but unsettled political conditions have retarded the movement of all but emergency shipments. Air cargo to Latin America, on the other hand, is already well developed. Although it is not expected that the Port of New York's share of overseas air cargo tonnage will equal its share of overseas surface merchandise traffic, it is anticipated that the New York-New Jersey Port District will capture 25 per cent of the nation's overseas air cargo tonnage in the future.

The forecast of originated United States overseas air cargo is given in Table 18 along with the forecast of overseas air cargo to be handled at Port of New York airports.

TABLE 18—FORECAST OF OVERSEAS AIR CARGO MOVEMENTS
(Total Tons)
1950-1980

Year	*U.S. Total Originated*	*Port of New York Handled*
1948	36,000	7,700
1949	na	8,900
1950	50,800	11,200
1965	163,400	40,900
1980	303,500	75,900
Per Cent Increase 1980 over 1948	743.1%	885.7%

DOMESTIC AIR MAIL TRAFFIC

An analysis of mail potentials is particularly appropriate at this time in view of the recent inauguration of air parcel post service and because of the imminence of an "All-Up Policy" under which first class mail would be carried by aircraft rather than surface carriers whenever delivery would be expedited thereby.

Air parcel post was inaugurated in September 1948, and is now offered as a companion service to surface parcel post. Both services

compete with rail and air express for the well-developed and expanding volume of parcel traffic.

A good deal has been said in the last few years concerning the application of the "All-Up Policy" to the carriage of first class mail. Since mail traffic is a federal monopoly, a single decision by the appropriate federal agency could transfer all long haul letter mail from surface carriers to air carriers. In view of the proposals in this direction and in keeping with the historic policy of the Federal government in expediting letter mail, it is expected that all first class mail moving over 1,000 miles will go by air after 1960 and that all first class mail over 500 miles will so move after 1965.

Though mail volumes do reflect business fluctuations, there has been little or no relationship between mail and economic growth trends during the past two decades. Except for the depression years of the thirties, tons of mail per 1,000 population have remained relatively constant.

The lack of any substantial direct relationship with economic indices is attributable, in part, to the fact that a large portion of mail is personal in character and levels of personal income have little bearing upon the sending of a personal letter. The forecast of total domestic letter mail, of which air mail is a part, has been related, therefore, directly to population growth.

Forecast of New York City Domestic Air Letter Mail

The New York City share of surface letter mail tonnage has remained consistently at about eight per cent of the national total.[13] In the case of air mail, New York in the mid-thirties generated slightly over 13 per cent of total domestic air letter mail. Its share declined to 10 per cent in 1941 and to 9.8 per cent in 1949. It is evident that its share of all letter mail will, in the future, approximate its share of surface letter mail. Accordingly, it has been concluded that this City's share of total letter mail (surface and air) will remain at eight per cent during the period of this forecast.

In 1931 air mail penetration of total New York City letter mail stood at 1.2 per cent and has shown a gradual, steady increase to 3.6 per cent in 1941 and 6.1 per cent in 1949. Most of the City's air letter mail is concentrated in the higher mileage brackets. A survey of air mail interchanged between this City and 54 major cities indicates that air mail constitutes less than 2 per cent of letter mail under 500 miles but accounts for 22 per cent in the 500-1,000 mile distance bracket, 29 per cent in the 1,000-2,000 mile bracket, and 44 per cent over 2,000 miles.

As previously noted, the forecast has applied the "All-Up Policy" to letter mail moving over 1,000 miles in 1960 and to letter mail moving

[13] Based on Cost Ascertainment data for New York and Brooklyn Post Offices.

over 500 miles by 1965. This results in an estimated increase in air penetration of the New York City letter mail tonnage from the 6.1 per cent penetration in 1949 to 19 per cent in 1960 and 45 per cent after 1965.

The forecast of domestic originated letter mail for the nation and for New York City is given in Table 19, together with the air mail forecast for New York City.

TABLE 19—FORECAST OF DOMESTIC LETTER MAIL ORIGINATED (TONS)
1950-1980

	National	*New York City* *	
Year	*Total Letter Mail*	*Total Letter Mail*	*Air Mail*
1949	310,300	28,100	1,600
1950	314,500	25,500	1,700
1965	351,700	28,500	12,800
1980	384,800	31,200	14,000
Per Cent Increase			
1980 over 1949	24.0%	10.9%	772.9%

* Based on Cost Ascertainment data for New York and Brooklyn Post Offices.

Domestic Parcel Post

Small parcel traffic has evidenced consistent growth characteristics. Over the past two decades parcel volumes have been increasing more rapidly than population but more slowly than national income. Future parcel volumes have been projected on the basis of historical relationships with both population and economic indices. Account has been taken of the fact that changes in business practices and methods of distribution have in the past and are currently having substantial effect upon parcel traffic services. Increasing use of truck delivery for parcels moving short distances and bulk shipments of merchandise by mail order houses designed to take parcel deliveries out of the higher zone classifications are examples of negative influences on volume, while the increasing retail adoption of hand-to-mouth buying methods has been a positive influence. In net effect, however, these developments constitute no bar to continued parcel traffic growth.

In determining the share that parcel post will receive of the total small parcel traffic, major consideration has been given to recent trends in the division between express and parcel post services. Parcel post received 51 per cent of the total in 1929, declined gradually to 33 per cent in 1941 and then moved up to 45 per cent by 1949. Current rail express rate increases have changed competitive relationships and will cause some further diversion to parcel post. It is anticipated that parcel post's share of total small parcel traffic will fluctuate between 50 and 55 per cent.

Forecast of New York City Domestic Air Parcel Post

New York's prewar share of domestic parcel post volume averaged nine per cent. Since this City is a major distribution center, the impact of postwar rail express rate increases has been particularly noticeable. The New York share of parcel post rose to 10.2 per cent in 1948. A further increase to over 13 per cent in 1949 is to be attributed largely to railway express labor difficulties. In 1950 New York's share is expected to recede to 11.0 per cent followed by a gradual upward trend to about 12.0 per cent in 1980.

Only two-tenths of one per cent of national parcel post tonnage moved by air in the first year of air parcel post service. It is difficult to forecast future penetration on the basis of this limited experience. However, New York's status as a distribution center and its high volume of shipments suited to air transportation provide a favorable environment for air parcel post growth. Further, it is felt that the past relationship of air to rail express provides a reasonable basis for establishing a general level of expectancy for the City's air parcel post. Accordingly, air transport's share of New York parcel post has been based on the division of New York express as between air and rail.

In 1949 the airlines carried five per cent of total New York area express shipments and this penetration is expected to increase to 12 per cent by 1980. An equivalent penetration on a shipment basis for parcel post will result in the four per cent poundage penetration which has been used for forecasting purposes.

The forecast of originated parcel post for the nation as a whole and for New York City is given in Table 20 together with the air parcel post forecast for New York City.

TABLE 20—FORECAST OF DOMESTIC PARCEL POST ORIGINATED (TONS)
1950-1980

	National	*New York City*	
Year	*Total Parcel Post*	*Total Parcel Post*	*Air Parcel Post*
1949	3,600,000*	484,200*	900
1950	3,100,000	340,600	1,700
1965	3,800,000	439,700	11,000
1980	4,700,000	544,600	21,800
Per cent Increase			
1980 over 1949	29.5%	12.5%	2,322.2%

* Tonnage of parcel post in 1949 was abnormally high because of rail express labor difficulties.

Port Authority airports handle mail not only from the City of New York but also from an extensive surrounding area. In addition, much air mail matter passes through the airports and must be rehandled in transit. It is necessary, therefore, to combine letter mail and parcel post data and to translate them into terms of airport mail to be handled.

TABLE 21—FORECAST OF DOMESTIC LETTER MAIL AND PARCEL POST TO BE HANDLED AT PORT OF NEW YORK AIRPORTS
1950-1980

Year	*Total Tons*
1949	14,600
1950	17,600
1965	108,400
1980	125,400
Per Cent Increase	
1980 over 1949	759.6%

OVERSEAS AIR MAIL TRAFFIC

To an increasing extent letter mail will be subjected to the competition of other forms of overseas communication and this will tend to hold down its rate of growth. Least affected, however, will be that part of overseas mail transported by air. This service experienced a gradual but substantial increase from 33 tons in 1932 to 368 tons in 1941. A tremendous upsurge occurred during the war, followed by a decline in volume with the return to peacetime conditions. About 5,000 tons of overseas air letter mail were transported during the year 1949.

Time savings inherent in air over surface transportation are unusually great in overseas movement due to both faster in-transit times and greater schedule frequency. These factors will continue to play a large part in obtaining for air services an increasing share of total letter mail. As early as 1942, 22 per cent of trans-Atlantic, 40 per cent of Latin American, and 50 per cent of trans-Pacific letter mail went by air transport; the national average was 36 per cent. In 1949 more than 65 per cent of the nation's overseas letter mail went by air.

Well before World War II many countries in Europe were moving first class mail under a single mail rate structure by either air or surface, whichever gave the earlier delivery. It is probable that the United States Government will soon adopt the "All-Up Policy" for the carriage of overseas mail. The forecast anticipates that all overseas letter mail will move by air beginning in 1955.

International air parcel post was initiated in March, 1948. It is offered as an expedited service, particularly adapted to the overseas movement of small packages. While this new service is destined to have a place, in the postal scheme for sample, personal, and other premium shipments, no great air penetration of the parcel post market can be expected due to a ten to one rate differential for the typical two pound shipment. As with domestic parcel post, it is anticipated that the greatest diversion will come from small shipments presently moving by air cargo and that by 1980 penetration will not exceed an estimated five per cent of total overseas parcel post.

Forecast of Port of New York Overseas Mail

The New Jersey-New York Metropolitan District is the largest generator of overseas mail; more important, its Port acts as a gateway for the dispatch of the major portion of the country's mail to all of Europe, Africa, and the Near East. In addition, much mail for Latin America clears through its port. Before the war, about 75 per cent of all overseas letter mail and parcel post was processed at the Port of New York. Currently, about 72 per cent of overseas surface letter mail and 46 per cent of overseas air letter mail are processed through this city. As discussed in the chapter on overseas passengers, the relative decline in the importance of Europe as an American market and the growing importance of Latin America will tend to prevent New York from regaining its prewar share.

However, as the volume of overseas mail moves downward from the currently inflated postwar levels, the Post Office will find administrative and operational advantages in consolidation of services at fewer ports. This will serve to increase the portion of overseas mail handled through the New York Port. It is anticipated that by 1970 the New York-New Jersey District share of overseas letter mail and parcel post will stabilize at about 65 per cent.

The Port of New York air letter mail forecast has been based on application of the "All-Up Policy" by 1955, while the air parcel post forecast has been based on a five per cent penetration of total New York-Northeastern New Jersey parcel post by 1980. Combination of the forecasts for dispatched air letter mail and air parcel post, in terms of traffic to be handled at the airports, results in the following estimates of overseas mail traffic for the Port Authority airports.

TABLE 22—FORECAST OF OVERSEAS LETTER MAIL AND PARCEL POST TO BE HANDLED AT PORT OF NEW YORK AIRPORTS
1950-1980

Year	*Total Tons*
1949	4,000
1950	4,700
1965	4,900
1980	6,100
Per Cent Increase	
1980 over 1949	52.1%

SUMMARY

A review of all the factors involved in the generation of intercity traffic makes it clear that the nation's transportation future depends basically on what the American economy will be like in the years ahead. Past trends reveal that traffic volumes and economic activity are closely related. The whole of this Forecast study has led, therefore, from an analysis of the state of the economy to a consideration of

intercity transportation in the nation as a whole, as well as to a study of competitive relationships between air and surface transport. It would appear well to summarize briefly the specific results of the study for all classes of air traffic – passengers, cargo, and mail.

The growth of air traffic during the coming thrity years will be stimulated by technological improvements in both aircraft and navigational aids. Turbo-prop and turbo-jet aircraft will make possible shorter flight times at lower fares.[14] Reduction or elimination of engine and propeller noises and vibration together with high altitude performance will mean great improvements in comfort. Airline operations will be freed from the vagaries of weather so that schedule dependability will compare favorably with that of surface carriers. At the same time, the safety record of the air transport industry will continue to improve.

The long term trend of increasing national income and population during the next three decades will mean an expanding national transportation market for both intercity passenger travel and commodity shipment. Thus, the growth in air traffic will result in part from (1) the increase in the national transportation market, and from (2) an increasing air share of this total market.

The domestic airlines in 1980 will account for 22 billion passenger miles of travel compared with 6.6 billion in 1949. By 1970 air travel will exceed intercity rail travel. Air transport will carry almost all of the common carrier passenger traffic moving beyond 1,000 miles and more than half of the traffic moving between 150 and 1,000 miles, but an insignificant part of travel under 150 miles.

Common carrier travel between the United States and other countries will double by 1980 and two-thirds of the travelers will use air services.

The New Jersey-New York Metropolitan District will maintain its position as the major air traffic center of the nation for the next thirty years, with air passengers in 1980 increasing to 2½ times the number in 1949, air cargo almost 7½ times, and air mail nearly 7 times.

For the nation as a whole, air cargo tonnage is expected to increase ninefold by 1980. The survey anticipates an "All-Up Policy" that would call for first class mail delivery by air when such delivery would be quicker than by surface transportation. Under such a policy, air mail tonnage would be multiplied seven times by 1980.

Appendix

Statistical data for Port of New York Airports for the year 1950 have now become available and permit a comparison of the first forecast year

[14] What is meant here is that airline fares and tariffs are expected to become more competitive with those of surface carriers, even though inflationary price increases may force all carriers to increase charges.

with actual operating results. These figures include traffic reported by both the scheduled and irregular air carriers at La Guardia, Newark, and New York International Airports. Progress has been made by the airlines in all six service characteristics—dependability, safety, frequency, comfort, cost, and speed—with resulting improvements to airline service. However, the major factors in 1950 air traffic development have all stemmed from national defense activities, particularly in the last half of the year. The Forecast itself, was completed prior to the outbreak of the Korean conflict and represented a projection of long-range trends in the development of national and Port District air traffic over the next thirty years.

It is to be noted that National Income in the first half of 1950 was running above the long-term trend. While the Forecast anticipated a National Income of 223 billion dollars at 1949 prices for the year 1950, the Department of Commerce reports an Income for the second quarter of the year alone at an annual rate of 229 billion dollars.

Total New York-Newark airport passenger traffic for 1950 was 108 percent of the forecast volume. Domestic passenger traffic was 110 percent while overseas passengers were 97 percent of the forecast. The developments of the last six months related to stepped-up mobilization of the American economy have led to an increase in domestic travel volume considerably ahead of that which would have been expected in normal peacetime. The same elements have led to a curtailment of increases in overseas travel because of unsettled international conditions.

Airmail volume is running slightly behind the forecast. Domestic mail is 93 percent and overseas mail 95 percent of forecast respectively. Changes in the air parcel post rate structure and consequent higher charges for such air shipments effective in November tended to prevent the traffic of the last quarter from reaching its expected volume as far as air parcel post traffic is concerned. Volume of air cargo in 1950 was 103 percent of forecast. Domestic cargo was 104 percent of anticipated volume, overseas 94 percent.

PASSENGER FARE POLICIES OF THE CIVIL AERONAUTICS BOARD

By Lucile Sheppard Keyes

Wellesley, B.A., 1940; Radcliffe, M.A., 1942; Radcliffe, Ph.D. (Econ.), 1948. *Formerly,* economist with the Board of Investigation and Research under Transportation Act of 1940 and with the Office of Inter-American Affairs. Author of study on "Federal Control of Entry into Air Transportation" and "National Policy Toward Commercial Aviation."

IT is only in the relatively recent past that problems of airline commercial rate policy have been accorded much attention by the Civil Aeronautics Board or, indeed, by the managements of the air carriers themselves. Although the Civil Aeronautics Act contains provisions for the regulation of commercial rates which are substantially similar to those applicable to surface carriers under the Interstate Commerce Act, the direct regulatory attainment of reasonable and non-discriminatory commercial rates was not conceived to be one of the primary tasks of the Civil Aeronautics Board, nor did this issue assume any great significance in the period immediately following the enactment of the law.[1]

This situation reflected in part the absence of independent rate initiative, on the part of individual carriers, of a type which would have posed for the Civil Aeronautics Board the problem of how to deal with the resulting repercussions on the revenues of competitors. Given the availability of mail revenues adequate to support its operations, there was no compelling pressure on any mail carrier to take the obvious risks of competitive retaliation and/or regulatory stricture involved in any significant departure from an established level of either rates or service.[2] The origination of such innovations by "newcomers" to the industry was effectively prevented until the post-war period by administrative control of entry. The substantial removal of the threat of new competition by this means no doubt added to the tendency toward preservation of the status quo on the part of existing carriers. In such a situation, it is hardly to be wondered at that neither Board nor carriers developed adequate cost data by which the appropriateness

[1] Two relatively early cases in which the issue of discriminatory commercial rates was dealt with by the Board are discussed below.

[2] Cf. Jones and Davis, "The 'Air Coach' Experiment and National Air Transport Policy," Part I, 17 J. Air L. & Com. 1, 3 (1950): "During the early years of the Civil Aeronautics Act it was generally agreed by the operators that special personal services such as stewardesses, free meals, extra-comfortable seats, and limousine service to and from airports were necessary to help overcome the reluctance of the general public to fly, and during this period of general expansion and growth there were no significant pressures for the development of a more Spartan type of service at lower fares."

of particular commercial rates or the profitability of particular commercial services might be judged.[3]

Until the later part of 1948, Board action with respect to commercial rates was largely concerned with overall rate levels as reflected in the magnitude of certificated air carrier earnings. A major exception was the Board's intervention in the air cargo field, where a floor was placed under air freight rates as a result of protests by noncertificated cargo carriers who were in real danger of being driven out of business by their certificated competitors. It is significant that this intervention to curb rate reduction was a result of competition *initiated* by "newcomers" in the air transport industry; however, the main issue presented (protection of the existence of the cargo carriers) and the rate standard adopted by the Board were essentially different from those in the passenger rate cases to be discussed here.[4] Regardless of the economic merits of the reasoning in this decision, it is evident that the very existence of the all-cargo carriers provided the Board with relevant cost data which did not involve it in the complex problem of the proper distribution of overhead among various classes of traffic.

In March, 1943, as a result of the very high wartime level of airline earnings, the Board issued a show-cause order to eleven certificated

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[3] In a detailed survey of airline commercial rate policy, Messrs. Gill and Bates have emphasized the fact that until recently very little attention was given to cost factors in setting airline commercial rates. This inattention is attributed to two factors: "*First*, neither the airlines nor the Civil Aeronautics Board knew accurately the actual costs of rendering the various kinds of airline services, either as to passengers or type of commodity carried, or as to route, segment, or station operated. . . . *Second*, in many cases there appeared to be little need for the airlines to know their costs accurately for this purpose because they would not be able to use this criterion in setting specific rates anyway, inasmuch as this would make many fares prohibitively high from the standpoint of rail competition." Frederick W. Gill and Gilbert L. Bates, AIRLINE COMPETITION (Boston, Harvard Graduate School of Business Adm., 1949), p. 419.

The first of these factors would seem to be a result rather than a cause of the inattention to cost considerations which it is adduced to explain. The second offers at best only a partial explanation for this phenomenon. In the first place the success of the Ludington experiment tends to confirm the view that costs would have permitted profitable "coach-type" operation in competition with rail carriers on high-density routes quite early in the game, even without mail traffic (see Jones and Davis, *op. cit.*, p. 1). In the second place, even in those cases where rail fares may have set an effective ceiling on airline rates on existing routes lower than the costs which could have been avoided if commercial air service had not been offered, a knowledge of this fact would have been required as a guide for the minimization of loss on such service. One can only conclude that airline managements were not greatly concerned with the magnitude or distribution of commercial profits and losses; and this is not surprising in view of the fact that the success or failure of their enterprises did not depend on the achievement of any nice adjustment of rates and services to commercial demand and cost conditions.

[4] The decision in the *Air Freight Rate Investigation* case was made on April 21, 1948 (Orders Serial No. E-1415). The standard referred to by the Board in determining the prescribed minimum was the average revenue ton-mile cost incurred by the threatened class of carriers in 1947. The use of this cost figure as a basis for a general minimum rate floor is defended on the ground that it represents "a practical minimum for the costs of an all-cargo service" and a reasonable approximation to attainable cost levels for cargo service by all types of carrier when the volume of air freight shall have reached full development. This line of reasoning enabled the Board to reject the "no-cost" and "marginal cost" standards advocated by the certificated carriers without committing itself to the "fully-allocated cost" concept advocated by the noncertificated carriers.

carriers envisaging a 10 percent overall reduction in passenger fares. The effect of these orders on the geographical rate structure was substantial; however the major purpose of the Board was related to the level rather than the structure of commercial rates.[5] Similarly, the subsequent additional fare reductions undertaken in 1945 by the carriers — which were at least in part a result of the initiation of Board action designed to effect a drastic decrease in mail rates — were "across-the-board" affairs,[6] as were the rate increases of 1947 (initiated by the carriers as a result of heavy losses),[7] and the Board-sponsored general increases of late 1948.[8]

By this time, the financial pressures resulting from the economic reverses of the airlines in the postwar period (when, contrary to the condition which had prevailed in the past, predetermined mail rates proved wholly inadequate to make up the difference between commercial revenues and total costs) and the example of the "air coach" operations of noncertificated newcomers (who had entered the sacred precincts through a legal loophole) had focused the attention of Board and carriers on the possibility of increasing net earnings by some rate actions more complicated than the mere manipulation upward of the fare level.[9] Thus at the August, 1948, rate conference the Board not only counselled a 10 per cent general increase in the regular fare level,

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[5] Gill and Bates, *op. cit.*, pp. 450-451; "This [show-cause] order did not bring about the over-all blanket 10% reduction in the then existing air fares which was originally contemplated. It resulted, rather, in many and varied compromises, some of which ironed out disparities in the existing fares. . . . For instance, the Big Four . . . adopted a system-wide uniform base rate of 5.5 cents per passenger mile. These carriers were impelled to overhaul their entire tariff structure in order to bring their various rates into line with this 5.5 cents base rate.

"There was little consistency in the reaction of the other seven carriers to the Board order. . . . The entire settlement was one of compromise whereby these [Big Four] airlines offered to take a small reduction in mail pay and to straighten out some of the obvious disparities of their tariff structures rather than adopt a blanket reduction of 10% in all their then existing fares."

[6] *Ibid.*, pp. 410-411: "On January 2, 1945 . . . another series of orders was issued by the Civil Aeronautics Board to the four largest domestic carriers, referring to their high profits and heavy traffic, and requiring that they show cause why an adjustment should not be made in their mail rates from the then existing level of 60 cents per ton mile to one of 32 cents per ton mile. These orders resulted in many counter fare proposals by the Big Four and other carriers not so affected, probably in anticipation of similar orders . . . the pressure of the CAB orders was not the sole reason for the adoption of these fare reductions. The managements of some of the carriers sincerely felt that they were necessary in order for them to enter the mass transportation market, and they had been leaning in that direction for some time . . . the result of these orders was that passenger fares and mail rates were reduced to a common level at 45 cents per ton mile for the Big Four. This meant that a compromise had been reached whereby passenger rates were reduced approximately 16% (5.5 cents per mile to 4.6 cents per mile)."

[7] *Ibid.*, pp. 411-412.

[8] *Ibid.*, pp. 412-413.

[9] Speaking on April 19, 1950, Board Chairman O'Connell described this development as follows (Mimeographed copy of speech made before the American Association of Airport Executives. Columbus, Ohio, pp. 2-4); "The last year and a half have already witnessed some notable changes in airline pricing and an awakening of price consciousness on the part of the industry, the public, and I might add, the Board. After the war and down to late 1948, airline pricing was basically simple . . . although the fare level moved down, and then up, several

but indicated that it would look with favor upon a cautious experimentation with promotional fares.[10]

The present article deals with regulatory policies and problems which have arisen in connection with this new "price consciousness." The first part of the discussion falls naturally into three sections: (1) the air coach experiment, (2) promotional fares other than air coach initiated by the carriers, and (3) rate policies suggested by the Board. It will here be brought out that a solution of the problem of the determination of legitimate mail payments — i.e., those payments which can be regarded as compensation for mail carriage rather than "subsidy" — is basic to a proper program of commercial rate regulation. The second part of this study will be devoted to a consideration of this problem.

The Air Coach Experiment

This phase of commercial rate policy has been comprehensively treated in a series of two articles in this Journal by Messrs. Harold A. Jones and Frederick Davis. The discussion here will be limited to pointing out the main objectives of regulatory action in this field and some problems of economic policy which may arise in the future.

First of all, it appears that the ultimate objective of past regulation has been to insure so far as possible that the coach-type services should increase rather than reduce carrier net revenues. To this end, the Board established certain requirements designed to insure not only that the unit costs of such services should be lower than average, but that there should be as little diversion of traffic as possible from the regular-fare services; it has also acted to keep coach fares from being initiated or continued at a level regarded as unprofitably low.[11] Both of the first two of these aims were served by the requirements for off-

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times in the postwar period it moved within the same simple framework and without much thought of pricing as a promotional or regulatory instrument.

"Beginning in the fall of 1948, extending through 1949, and down to the present there has been an increasing awareness on the part of the industry of air transportation pricing.

"In the history of this growing price consciousness August 19, 1948 is an important date. On that day the Board called a meeting of the domestic trunklines to discuss fare problems. The airline financial picture at the time was bleak. . . .

"There were perhaps several reasons for the timing of this renewed interest in the price tag which is put on air transportation. Perhaps one factor was the success of air coach services which the large irregular carriers had been operating over certain high-density, long-haul segments, notably transcontinental, at materially reduced fares and with unusually high passenger loads."

[10] This conference thus did not result in a general 10 percent fare increase. Gill and Bates (*loc. cit.*) have described the result as follows: "Following the conference, there was considerable confusion. Most carriers filed intentions to raise fares 10% effective in September. Several also filed tariffs which included round-trip and other discounts. When these increases in fares went into effect, together with the discounts which accompanied them, what started out to be a 10% fare increase actually turned out to be considerably less than 10%. The president of one major airline estimated it to be an increase of no more than 2%."

[11] On September 27, 1950, the Board imposed a general 4½ cent minimum (with certain minor exceptions) for coach fares to become effective on November 16. The prevailing coach rate at the time of the Board's action was about 4 cents a mile. At the same time, the effective period of the Board's tentative sanction

peak scheduling, elimination of "non-essential" passenger services, and use of high-density equipment, and the first was further implemented by the limitation of coach service to high-traffic routes. It is, of course, possible to question the wisdom of this particular approach to the air coach proposals on its own ground – that is, to argue that the restrictions insisted upon by the Board were in some respects or in some markets defective as a means of maximizing profits. For example, there may be in many cases a conflict between the achievement of high load factors on the coach services and the minimization of diversion from regular-fare service: in excluding from coach travel a relatively large part of the high-fare traffic by such means as the "off-peak" scheduling requirement, one may also exclude new traffic which might fill up coach planes in the daytime but would not be diverted from surface transport agencies by extremely inconvenient (though low-cost) air schedules, and it might be that the profit from this new traffic would be sufficient to offset the presumable loss from increased diversion. But given the assumption that no decrease in the regular fare level could fail to reduce profits on any given route,[12] the Board's concern with the insulation of this market from diversion to lower-fare services seems reasonably justified. Experimentation with more liberal schemes of division of the market might have resulted in a complete breakdown of the division itself.

The Board's recent sanction of low-fare services in the transcontinental market without the most important limitation previously imposed shows a recognition that the above assumption may not now hold good on all routes. Compelling evidence was adduced to show that such services could be expected to be as profitable as high-rate services on the same run, the diversion of traffic thus being rendered of no concern.[13] Although no change is thus involved in the main principle governing the Board's action, it has been recognized that making the coach fare the regular fare on certain runs may give rise

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of such services was extended from September 30, 1950 to March 31, 1951. This action was based on the Board's interpretation of data made available to it on the financial results of the coach services as showing that the 4-cent rate did not maximize profits. In this connection the Board said: "The large proportions of coach traffic moving over segments where the service is offered, substantial diversion of traffic from standard fare services, and the importance of maximizing revenues on these segments to counterbalance lower revenues on segments of lesser traffic density form the underlying reasons in support of this conclusion."

[12] The Board's view has apparently been that at least as a general rule the lowering of the regular fare level would decrease profits. For example, in the above-cited speech, Mr. O'Connell said (p. 7): "This industry is not yet ready for rate reductions on an across-the-board basis. Despite increased traffic, it still needs a general fare level between 5½ and 6¢ a passenger mile. We are not ready financially and we are not ready cost-wise and we are not ready subsidy-wise for a 4¢ domestic airline system. To make broad and deep fare cuts would inevitably at the present time invite either financial disaster or else enormously increased subsidization. In the immediate future, therefore, a continuation of promotional pricing on a restricted and highly selective basis seems to make sense."

[13] Jones and Davis, *op. cit.*, p. 10.

to difficult regulatory problems, or at any rate may force the Board to consider carefully the problem of geographical rate relationships.

Reflection of Varying Costs in Geographical Rate Structure

As Messrs. Jones and Davis have suggested, a charge of unfair treatment may be made by users of low-density routes on which higher rates are charged and their complaints may be reinforced by the argument that as taxpayers — and therefore supporters of the airlines — they are entitled to travel at coach fares "as a matter of right."[14] Leaving the latter point aside for the moment, there seems to be little reason to suppose that a differential rate policy reflecting varying unit costs on high and low density routes could be successfully attacked on legal grounds, provided that the differentials were uniformly applied.

While it is true that uniformity in per mile railroad passenger fares over broad areas, embracing different carriers and routes of widely varying transportation characteristics, has been permitted by the Interstate Commerce Commission, it is also true (1) that this type of rate structure has been a result of carrier rather than regulatory initiative;[15] (2) that variations from such uniformity by individual carriers, both with respect to their entire systems and with respect to certain lines only, have been permitted;[16] (3) that variations from uniformity as between regions have been permitted;[17] and, perhaps most signifi-

[14] *Ibid.*, pp. 16-17.

[15] On the importance of carrier action in shaping the rail passenger rate structure, and the general policy of non-interference followed by the I.C.C. with respect to passenger fares, see Kent T. Healy, *The Economics of Transportation in America* (Copyright, 1940, by the Ronald Press Company, New York), especially p. 507: "All told then, except for the rather spectacular action of the Commission in actual control of coach fares in the East, the extent of regulatory control of passenger fares has been almost negligible."

The "rather spectacular action" referred to here is the Commission's imposition in 1936 of a uniform maximum for basic regular passenger fares all over the country of 2 cents per passenger mile in coaches and 3 cents per passenger mile in Pullmans. The practical effect of this order was to bring down the fares in the East to a level uniform with (or only slightly higher than) those then prevailing in other areas. Significantly enough, this action was explained primarily by the argument that, in view of the experience of carriers in other regions, the Eastern roads would be better off financially with the prescribed fare level than with the higher existing fares. *Passenger Fares and Surcharges*, 214 I.C.C. 174, 222-223 (1936). In addition, the Commission pointed out (p. 234) that no valid argument based on transportation considerations was adduced by the Eastern carriers in support of a higher fare level.

The establishment of substantial nationwide uniformity in rail passenger rates at the time of the first World War, and subsequent departures from it, were neither engineered nor interfered with by the I.C.C. (There is a brief description of this development in the above-cited decision, pp. 186-188).

[16] See, for example, *Increased Passenger Fares, New Haven Railroad*, 268 I.C.C. 303 (1947).

[17] See, for example, the situation described in 214 I.C.C. 174, 187-188: "Prior to 1933, despite increased losses in passenger traffic and mounting deficits therefrom, little experimentation with the basic fare of 3.6 cents, except as will later appear, was attempted by respondents. . . . Commencing in 1927, various southern and western respondents began to experiment with reduced basic fares. . . . Commencing in 1931, the Boston and Maine Railroad, and in 1932 the Boston and Albany Railroad, in order to meet highway competition, established reduced round-trip one-day fares between certain stations on their respective lines, and

cantly, (4) that variations from uniformity have been permitted for the express purpose of reflecting higher unit costs on certain lines (the low density of their traffic being recognized as a pertinent cost factor) even where the Commission has intervened to prevent an intra-regional differentiation in the fare level not related to transportation considerations.[18] It should be emphasized that the Commission has not held that nationwide or regionwide uniformity in fare levels was in itself the *desideratum,* but (1) that rate differentials should be justified by varying transportation conditions and (2) by implication, that such differentials should be applied uniformly if at all.[19] Thus the Commission permitted the continuation in the Mountain-Pacific States of fares on branches and secondary lines of the defendant railroads which were much higher than fare rates found unreasonable and unduly prejudicial for main line travel, the decision taking note of the fact that this type of differential amounted to general practice among

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in 1932 the New Haven established reduced fares between New York, N.Y., and Providence, R.I., and Boston, Mass. All of these New England reduced fares were canceled on or before September 27, 1934. On December 1, 1933, the southern respondents, with certain exceptions, eliminated the surcharge, and established reduced basic fares of 1.5 cents in coaches, and 3 cents one way, 2.5 cents round-trip limited to 30 days, later extended to 6 months, and 2 cents round-trip limited to 15 days, in pullmans. On the same date the western respondents generally likewise eliminated the surcharge and reduced their basic fare to 2 cents in coaches and 3 cents one way, 2.5 cents round-trip limited to 6 months, and 2 cents round-trip limited to 10 days, in pullmans. The Illinois Central Railroad Company, Chicago and Eastern Illinois Railway Company, Alton Railroad Company, and Wabash Railway Company at and west of Danville, Ill., . . . became parties to the western arrangement, and the first-mentioned respondent applied the experimental fares of the western lines over its entire system, a portion of which is in the southern district, except where necessary to meet the lower 1.5-cent coach fare of other lines in the South. The eastern carriers, with some exceptions, have met the reduced fares at border points and on traffic competitive with that moving on the reduced fares. On February 1, 1934, the Norfolk and Western Railway Company . . . reduced its one-way fares to 3 cents in pullmans and 2 cents in coaches, and this reduction was met by the Chesapeake and Ohio Railway Company, . . . between the more important competitive points. Except as just indicated, in the eastern district the basic-fare structure has remained intact."

[18] *Arizona Corporation Commission et al. v. Arizona Eastern Railroad Company et al.,* 85 I.C.C. 76 (1923). Such a differentiation was ordered eliminated by the I.C.C. in 1923, when it acted to bring the basic passenger fare level between main line points in the States of Arizona, New Mexico and Nevada (then 4.8 cents) down to that prevailing elsewhere, including States with similar transportation characteristics (3.6 cents). The higher rates were found unreasonably and unduly prejudicial because not justified by differences in transportation factors.

[19] 85 I.C.C. 76, 92: "The evidence shows clearly that, based upon operating conditions [such as steep grades, hard water and weather conditions] and density of traffic, the States of Arizona, Nevada, and New Mexico are entitled to main-line passenger fares not higher relatively than those which prevail in other States of the mountain-Pacific group. Operating conditions, population, and density of traffic vary greatly in different parts of the United States. Nevertheless, the basic interstate passenger fare generally applicable to and from points in all States except those complaining is 3.6 cents per mile. With the exception of these States, there is no State in the Union to and from which passenger fares are established on a basis uniformly and arbitrarily higher than 3.6 cents per mile, without regard to the circumstances and conditions obtaining in different sections thereof."

the railroads.[20] The higher branch line rates were specifically excluded from the application of the general rate ceiling applied in 1936.[21]

The Commission's general policy of sanctioning departures from strict distance relationships in freight rates where such departure is warranted by such cost-affecting factors as density of traffic and length of haul[22] would also tend to support a similar policy with respect to passenger fares by the Civil Aeronautics Board.[23] Even some potentially troublesome statements indicating a Commission construction

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[20] *Ibid.*: "The evidence shows that passenger fares on branch lines of many carriers other than defendants, in the mountain-Pacific group and in the United States generally, are on a higher basis than 3.6 cents. These branch-line rates vary from 4 to 9.6 cents per mile."

This decision was later modified to permit (among other things) the Denver and Rio Grande Western to maintain higher rates on its main line than the 3.6 cents generally prescribed, primarily because of the road's extraordinarily difficult operating conditions. 88 I.C.C. 90, 91-2 (1924).

[21] See *note* 15, above. Further precedent for differential charging for low-density passenger services can be found in *The Commutation Rate Case*, 27 I.C.C. 549, 552 (1913): "The commutation traffic of the New Haven is very materially more dense than on the Pennsylvania. Giving due consideration to this and other facts shown of record, we think that the New Haven schedule of fares for this service may properly be somewhat lower than that of the Pennsylvania . . . ."

[22] Only a few examples can be cited here. Speaking of the class rate structures prescribed by the Commission since 1925, Dr. Locklin has said: "The structures are in general conformance with the distance principle, and distance scales of first-class rates have been generally prescribed by the Commission. *The scales are constructed upon the 'tapering principle,'* that is, the rates increase with distance but at a decreasing rate, thus resulting in *lower rates per mile for the longer distances* . . . . The rate scales are uniform for large areas, although *not necessarily for the whole area covered by the investigation.* [for example] In *Eastern Class Rate Investigation* two scales were provided for New England: A zone A scale for southern New England, and a zone B scale, 10 percent higher, for northern New England. . . . *The differences in scales are usually for the purpose of reflecting differing operating costs due to variations in operating conditions or in traffic density.* Even where a uniform basic scale is prescribed for a whole territory, *exceptions are commonly allowed which take the form of 'arbitraries' for distances on branch lines, or on short and weak lines.*" (Italics supplied.) D. P. Locklin "*Rates and Rate Structure*," *Transportation and National Policy* (Washington, U.S.G.P.O., 1942) p. 89.

[23] On the general question of Commission treatment of distance relationships in connection with Sections 1 and 3 of the Interstate Commerce Act, Professor Sharfman has written: ". . . both in . . . determinations as to reasonableness and in situations under section 3, where rate relationships are themselves specifically at issue, distance alone has not provided an adequate criterion of cost in the comparison of hauls, since wide differences prevail both in topographical conditions and in other circumstances which produce inequalities in construction and operating costs over related routes. Such factors as these, together with the effect of different traffic densities upon unit costs of carriage, have been recognized by the Commission in numerous instances as constituting significant elements in the cost of service and as properly qualifying the influence of the distance factor." I. L. Sharfman, *The Interstate Commerce Commission* (New York, The Commonwealth Fund, 1936), Part III, Volume B, pp. 569-570.

It should be observed, however, that the Commission and the Supreme Court have held that a given rate cannot be held confiscatory merely because it does not yield a profit from every operation to which it applies. Thus, in *St. Louis and San Francisco Ry. Co. v. Gill*, 156 U.S. 649 (1895) at pp. 665-666, the Supreme Court held that the carrier "cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative." This view seems to be an eminently practical one, for under a contrary doctrine the task of the regulators in setting reasonable rates would be hopelessly complicated. The general desirability of a rate structure in conformity with relative costs must in practice be weighed against the necessity of setting rates which apply to more than one mile of line and more than one shipment of any commodity.

of the long-and-short-haul clause which might preclude full recognition of cost differences where this would lead to a higher rate for a shorter haul on the same route in the same direction[24] need not concern the Board should such a situation arise in the airline field, since the Civil Aeronautics Act has no such clause. All in all, therefore, it seems unlikely that the Board could be successfully challenged by an appeal to regulatory precedent in a policy, uniformly applied, of fare differentials roughly reflecting cost differences; no difficulty from this source need be anticipated if it is decided in this manner to abandon the so-called "traditional single-level fare structure."[25]

The possibility that the subsidized nature of the industry might result in demands for universal low-rate services regardless of their profitability cannot be easily dismissed. Such a possibility will remain to plague both Board and carriers as long as the latter are entitled by law to a subsidy which is not clearly related to a specific national objective, and hence can be represented as a "Government dole." Where the nature of the "value received" in return for Govrnment support is not clear, John Doe, taxpayer, may with some justice believe that the "value received" should be a personal benefit to him or a bounty to his community.

Incidence of Support for High Cost Operations

As long as the Board continues to permit only those coach services which add to, or do not reduce, profits on operations between the points to which they apply, the second major problem suggested by Messrs. Jones and Davis – i.e., a possible shift in the incidence of the support of the less profitable services – will not arise.[26] However, even

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[24] See Sharfman, *op. cit.*, p. 546, note 389.

[25] Jones and Davis, *op. cit.*, p. 20. It seems doubtful that the single-level fare structure referred to is of sufficient age or universality to be called "traditional." On this point, see Gill and Bates, *op. cit., passim*; the following passages will indicate the general nature of the relevant material: p. 398: "Before 1943 variable base rates were almost universally used among the domestic airlines."

p. 443: "The period in airline fare history before 1943 can best be characterized as one in which there was little evidence of a uniform level of air fares from carrier to carrier."

pp. 462-463: "It should not be inferred . . . that in the period after 1943 uniform base rates had been adopted by most of the carriers throughout their systems. What had happened was that a few of the carriers were using such a uniform base rate, but that many others had adopted a variable base rate; . . . since in most cases the competitive segments accounted for a major portion of carriers' revenues, or passenger miles, and since the base rate adopted in such markets was that of the original carrier, the passenger revenues per passenger mile of most of the air carriers became more and more comparable, as the extent of airline competition increased."

[26] Jones and Davis, *op. cit.*, p. 19: ". . . the drive for high load factors in high-density equipment, particularly in fast modern aircraft such as the DC-6 and Constellation, is almost certain to involve a considerable amount of diversion from regular fare services. If so, it may mean that by diverting a high proportion of the carriers' long-haul business (coach operations must of necessity be conducted over fairly long-haul segments) the more profitable portion of the regular business would be eliminated, without any proportional increase in net revenues. The overall system net revenues might thus be reduced, even though the promotional coach service were successful, since the bulk of the carriers' profitable long-haul

under these circumstances it is quite possible that the question of principle involved here may be raised by some spokesman for consumers of transport services on the high-density segments: that is, the question whether fares which actually reduce net profit on high density routes should not be permitted, where justified by particular costs on this route, even though the reduction in system profitability would make it impossible to support certain high-cost services previously offered. Such a situation would imply that the latter services had been genuinely dependent upon — i.e., subsidized by — profits from high-density routes in the past, in other words, that the rates on these routes could have been lower all along had it not been for the necessity of supporting the high-cost services. The problem here is not a shift in rate relationships because of the appearance of a new cost pattern, but a shift to provide a closer conformity to the cost pattern.[27]

It appears that conformity to regulatory precedent would not require the continuation of support for such intrinsically unprofitable services, unless, at the very least, a clear showing of actual hardship to arise from the cessation of such support and/or of a real prospect of self-support for these services in the relatively near future could be made. Any regulatory requirement that one part of a carrier's traffic be burdened in order to support service to another part has been in principle condemned by the courts on various occasions.[28] More specific support for the above view with respect to relationships between

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low-cost service would be performed at a lowered rate, without a corresponding increase in the standard rates for the high-cost traffic between smaller points, the losses on which are presently offset by a profit from the low-cost heavy traffic between major points."

[27] The possible future emergence of such problems may have been foreseen by Chairman O'Connell in the above-cited speech, p. 8, where he lists among the "general criteria and objectives of a sound long-range fare policy" the following item: "A close relationship between the level and structure of fares and the cost to the carriers of performing various types of services so that the various classes and types of traffic each bears as nearly as possible its fair share of costs."

[28] The following quotations are illustrative (the second seems especially pertinent here): *Norfolk and Western Ry. Co. v. West Virginia*, 236 U.S. 605, 609 (1915): ". . . it would not be contended that the State might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the State should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the date was considered, or would provide only a nominal reward in addition to cost."

Northern Pacific Ry. Co. v. State of North Dakota, 236 U.S. 585, 598 (1915): "In substance, the argument is that the rate was imposed to aid in the development of a local industry and thus to confer a benefit upon the people of the State. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the State, are emphasized. But while local interests serve as a motive for enforcing reasonable rates, *it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise.* That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. *It does not aid the*

routes is provided by the principles which have governed I.C.C. regulation of railroad abandonments.

As is well known, the leading judicial pronouncements on the abandonment question, while unequivocally ruling out regulatory action to require the maintenance in operation of an entire system which is being operated at a loss, leave open some degree of regulatory discretion for the recognition of local user interests when the entity to be abandoned is only a part of a system, even though demonstrably a losing proposition.[29] Despite the variability of the statements of the Commission on the general position taken by it on the abandonment of parts of a system, it can be said with certainty that it has not interpreted the statute as requiring it to force the maintenance of unprofitable lines desired by local interests merely because the system as a whole is in a position to support them. In his recent comprehensive study of the regulation of abandonments, Dr. Cherington has noted that the mere fact that the system is prosperous is not enough in itself to rebut the applicant's showing of loss on a particular segment: "The strongest systems have been permitted to abandon lines despite the most vigorous protests." [30] Furthermore, Dr. Cherington has found that

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argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable." (Emphasis supplied.)

[29] With respect to an entire system, the Supreme Court has said: "The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation . . . To compel it to go on at a loss . . . would be to take its property without the just compensation which is a part of due process of law." *Railroad Commission of Texas v. Eastern Texas R.R. Co.*, 264 U.S. 78, 85 (1924).

With respect to a part of a system, the Court has said: ". . . the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier . . . the determination is made upon a balancing of the respective interests . . . In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling." *State of Colorado v. U.S.*, 271 U.S. 153, 169 (1926).

[30] Charles R. Cherington, *The Regulation of Railroad Abandonments* (Cambridge, Harvard University Press, 1948), p. 128. In this connection, Dr. Cherington cites the following statement in *Long Island Railroad Company Abandonment*, 166 I.C.C. 671 (1930) at p. 677: "It is true that even though we add to the applicant's transportation losses from operation of the branch the capital charge which would be imposed upon it by the proposed grade-crossing elimination, the amount involved is relatively small when compared to the financial resources and transactions of the Pennsylvania system. Nevertheless it must be recognized that the conservation of the resources of any railroad system requires cognizance of items even less substantial than those here involved. Any unnecessary burden upon the transportation system of the country is an unreasonable burden. While it is true that loss from operation of a portion of a railroad system will not in every case justify the abandonment of such operation, it is also true that circumstances may justify the abandonment of an unprofitable line notwithstanding the prosperity of the system as a whole. The circumstances of each case must govern its disposition."

the contrary view, though adopted at times by at least one individual Commissioner,[31] has been consistently rejected by the majority of the Commission, which has expressly refused to construe the statutory provision regarding public convenience and necessity as meaning that a service must be maintained as long as anybody needs it. The Commission has said that such a construction would call into question the constitutionality of the statute, and has moreover adopted the view that the fact that a service is operated at a loss is pertinent evidence that the public convenience and necessity do not require its continuation.[32] It is significant here that "the vast majority of the contested applications are granted";[33] that in a great many instances where such applications were initially denied the Commission indicated that its decision could be reversed should the line not develop more traffic in the future;[34] and that denials have in fact frequently been reversed when the situation failed to improve.[35]

Indeed, there is weighty support in the record for the view that unprofitable lines will not be ordered continued in operation unless there is strong evidence that they will cease to be unprofitable in a relatively short time; at any rate, the balancing of carrier loss against loss to local interests does not generally result in a requirement that unprofitable lines be continued in operation, regardless of the relative magnitudes of such losses.[36] It is only because of Court pronounce-

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[31] This contrary view was expressed by Commissioner McChord as follows: (*Atlanta and St. Andrews Bay Ry. Co. Abandonment*, 71 I.C.C. 784, 793 (1922): "Except in so far as it may be supported by the sovereign State, which is not subject to coercion, a highway once dedicated to the public use may not be abandoned without regard to the public interest in it. A common carrier by railroad, which does not enjoy the sovereign's immunity but does exercise a delegated sovereign right of eminent domain, may not abandon the highway it creates, if by appropriate means it can maintain it, so long as the public convenience and necessity remain to be served. He whose property is appropriated, even by his gift, for use in constructing such a highway cannot thereafter interfere with the public use, and a corresponding obligation to the public rests upon the carrier. The duty to the public includes the duty to exhaust every lawful expedient to maintain the highway in such condition as to meet the public convenience and necessity. Only when it is beyond the carrier's power, or when the public interest ceases, does the duty cease."

[32] Cherington, *op. cit.*, pp. 130-131.

[33] *Ibid.*, p. 133.

[34] Healy, *op. cit.*, p. 528: "1,085 applications for abandonment had been granted up to July 1936 and only 49 denied. Some 17,000 miles were certified for abandonment and less than 1,000 miles were ordered to be kept in operation. Even in the latter cases future abandonment was not precluded, the Commission merely requiring that further study of the problem be made in the hope that additional traffic would be found so that abandonment would not be necessary."

[35] Cherington, *op. cit.*, p. 180: "Of the forty applications which were denied prior to 1930, twenty-two had been renewed and subsequently granted by the end of 1941 . . . in the second decade (1930-1941) . . . Sixteen of the forty-three segments for which permission was first denied were subsequently abandoned with Commission authority."

[36] The following statements by Dr. Cherington (*op. cit.*, pp. 133-134) which are fully supported by many references to Commission decisions, are significant here: "It is not enough simply for large numbers of witnesses to appear at the hearing and protest. They must be prepared to bring forward convincing evidence not only that they would like to have the line continued but that they need to have it continued as a matter of necessity. The testimony must persuade the

ments such as that cited above (footnote 29) and similar dicta by the Commission that this view cannot be unequivocally supported by the record; and it is significant that the Commission's regular line of decision has not been subjected to reversal.

It should here be noted that the Commission has rightly insisted that, in the measurement of the "system loss" pertinent in abandonment proceedings, the carriers should attempt to get at the actual outlays which could be avoided if the line were abandoned and the actual loss in revenues which would take place in this event. While the Commission has perhaps been annoyingly indefinite on questions of detailed accounting procedure acceptable to it, it has definitely quashed carrier attempts to include in the expense calculations allocations of general overhead costs which would not be appreciably affected by abandonment of a segment[37] and has insisted that the revenue calculations taken into account the "feeder value" of the branch on a realistic basis.[38]

It is true that the minimum rate power has in some instances been used to prevent a rate reduction which, although it would not in itself result in a rate demonstrably below fully-allocated cost for the traffic to which it was to apply, would tend indirectly to jeopardize the overall profitability of railroad operations. However, this has in general been done in cases where the rate reduction in question would necessitate widespread decreases in competitively related rates or rates on the same commodity for hauls having substantially similar transportation characteristics.[39] Furthermore, the more common use of the power to prevent rates which are below specific costs for the traffic in question

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Commission that there is prospect that the railroad will be used to a sufficient extent to give some prospect of its being able to support itself . . .

"In any event . . . no amount of local objection will prevent an abandonment unless the local interests appear to be able and willing to supply enough business to keep the line running now or in the future."

[37] Cherington, *op. cit.*, p. 162. The Board's staff has recently tangled with this problem in the *Southwest Renewal—United Suspension Case* (Docket No. 3718 *et al.*). In the Examiner's Report, dated March 23, 1950, strange and wonderful results have been obtained by the use of two different methods of calculating the profitability of several individual stations on United's system. For example, we find (p. 56) that United lost $8,889 on its service to Eureka, California, in 1948; we also find (p. 59) that, also on the basis of 1948 figures, United would lose $27,986 annually as a result of the suspension of its service to Eureka. The method leading to the latter result, which appears to be the one chiefly relied on by the Examiner in reaching his conclusions, seems far less objectionable than the other type of calculation included in the Report. The treatment of system overhead, while questionable in detail, is, as the Examiner pointed out (pp. 50-52), probably more justifiable where several stations are to be suspended than where the suspension of only one point is being considered. In view of the facts (a) that the Board itself has not yet rendered any decision in this case and (b) that the defects in the particular accounting methods used are of small concern as compared with the generally objectionable character of the action recommended by the Examiner, it does not seem worth while to criticize these accounting procedures in detail.

[38] Cherington, *op. cit.*, pp. 163-164.

[39] See, for example, *Intrastate Rates on Bituminous Coal Between Points in Illinois*, 206 I.C.C. 120, 123-124 (1934); *Cement, in Carloads, from Linwood, Iowa, to Points in Illinois*, 140 I.C.C. 579, 582 (1928); *Salt Cases of* 1923, 92 I.C.C. 388, 410-412 (1924).

(or are barely compensatory without compelling reason) and thus throw a burden on other traffic[40] provides a precedent for not permitting unprofitable low-fare service on high-cost lines.

In general, then, there would seem to be no legal obstacle to the adjustment of the geographical fare structure to provide a more adequate reflection of cost differences; and the weight of precedent appears to be against the enforcement of a fare structure imposing unduly high rates on one segment in order that another shall be afforded a service whose revenues are insufficient to cover the costs to which it gives rise. After all this has been said, however, it would be quite wrong to conclude (a) that all air operations whose contributions to system commercial revenues fall short of their contributions to system expenses should be abandoned or consigned to the limbo of subsidized operations (even though allowance should have been made for the temporary reprieve of those routes which showed promise of early commercial self-sufficiency); (b) that the proper level of commercial rates on route segments capable of commercial self-sufficiency is that level which will provide such self-sufficiency; or (c) in determining the appropriate total yield which should be produced by any segment, that either out-of-pocket cost or fully-allocated cost provides a generally valid "ceiling" above which the yield should not be permitted to go.

Propositions (a) and (b) are untrue because the courses of action which they envisage would involve ignoring completely the legitimate mail payments which should be attributed to such segments and would therefore logically lead to (1) the establishment of unduly high commercial rates on segments capable of commercial self-support and (2) the abandonment, or stigmatization as subsidized, of short routes which might in fact be fully self-supporting on the basis of total legitimate revenue yield.

The third proposition, which is meant to apply to total (not merely commercial) revenue yield, is untrue because neither of the two cost

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[40] See D. P. Locklin, *op. cit.*, pp. 108-109.

On this point, Dr. Sharfman has noted (*op. cit.*, p. 443) that although "the Commission has sometimes spoken as if it were proper for better-paying traffic to bear part of the cost of moving cheaper commodities," "on the whole it appears to have been its policy from the beginning *not to permit rates to be fixed at so low a level on any traffic as to burden other traffic.*" (Emphasis supplied.) The typical attitude of the Commission is illustrated by the following quotation: "Put such a rate on corn as will encourage and warrant its movement if such a rate is fairly remunerative. While rates should not be so low as to impose a burden on other traffic they should have reasonable relation to cost of production and the value of the transportation service to the producer and shipper." *Rates and Charges on Food Products*, 3 I.C.R. 93, 104 (1890). The contrary view—or, as Dr. Sharfman describes it, the "idea of having one type of traffic subsidize another"—is illustrated by a statement in the Commission's *Annual Report* for 1890, pp. 14-15: "In every classification . . . articles whose value is very great in proportion to the bulk or weight are classed high in the expectation that the rates imposed upon them will pay not merely the cost of transportation and a fair profit to the carrier, but will contribute also toward adequate remuneration for the transportation of such articles as cannot bear proportionate charges."

measures referred to accurately reflects the point above which an "undue burden" would be placed on any particular operation. In terms of this "burden" concept, out-of-pocket costs represent a generally valid "floor," below which the maintenance of any operation would clearly entail the burdening of other traffic; but the appropriate yield to be drawn from any given operation may lie anywhere between this general minimum and the revenue level at which this service could be supported as an entirely isolated operation. It is this latter level, rather than fully-allocated costs, which constitutes the generally applicable "ceiling" for legitimate revenues from any service.

The chief point to be made here is that the adjustment of the geographical commercial fare structure to conform more closely to the cost pattern and the measurement of the degree of self-support of the various segments of any airline system (whether or not the measurement is made with a view to the abandonment of non-self-supporting segments) cannot be done without the ascertainment of legitimate mail payments to be attributed to these segments, and will also require a more sophisticated approach to cost questions than is embodied in a mere mechanical allocation of overhead.

Promotional Fares (Other Than Air Coach) Initiated by the Carriers

Here again it is generally true that the Board's chief aim has been to insure that these promotional fares result in increased rather than decreased net revenues to the carriers. Thus, the Board indicated that it would approve a "family fare" plan only where there was good prospect that such a plan would result in increased utilization of idle facilities by traffic which would not have traveled at regular fares[41] and

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[41] *C.A.B. Policy Statement on Coach and Promotional Tariffs*, September 7, 1949, p. 3: "Many of the domestic air carriers have had in effect since last fall or winter the so-called family fare plan under which members of a family may travel by air at a reduction (usually 50%) from the regular fare if traveling with the head of the family on certain off-peak days of the week, such as Monday, Tuesday and Wednesday. This plan appears to have been successful in building up traffic for the carriers during the periods of the week when traffic is usually light. The success of the plan in generating new traffic, as opposed to simply diverting traffic from a peak to an off-peak period of the week, is not entirely clear, but the indications from the material which has been submitted to us by the carriers are that a considerable proportion of family fare traffic is in fact newly generated. Accordingly, we are inclined to look with favor upon a continuation of the family fare plan. Since we do not yet have available data with respect to the family fare plan during the peak summer season we shall limit the extension to June 30, 1950.

"We will expect those carriers which do not now have the family fare plan in effect, but which desire to file tariffs containing the plan, to support such filings with adequate traffic data, indicating the nature and extent of their off-peak traffic loads. We are not prepared to approve, as some carriers have proposed, a family fare plan which would be applicable to all days of the week."

It should here be noted that a plan which actually succeeded in diverting traffic from peak to off-peak periods might increase net revenue in the long run even though no new traffic were generated and the total revenue was therefore necessarily decreased to some extent. This would be the case if the economies made possible by a more even distribution of the traffic over time were sufficient to more than offset this decrease in revenue. This argument assumes that "peak" capacity could be reduced if not required to accommodate commercial traffic.

that the results of certain other promotional fares would be closely scrutinized "to make a determination as to whether they are economical [and] . . . whether they were attracting to the carriers, having the tariffs in effect, any appreciable volume of additional traffic."[42]

The Summer Excursion Fares Case

Interesting examples of the employment of traditional regulatory categories to revise managerial price policy in the interest of maximization of carrier profits (or minimization of losses) are to be found in recent Board opinions dealing with promotional fare proposals. In *The Summer Excursion Fares Case,*[43] certain proposed 21-day round-trip excursion fares, to apply during the summer months between points in Florida and certain northern and mid-western points, were initially found to be unjust, unreasonable and unjustly discriminatory, judgment subsequently being deferred on the question of unjust discrimination. The decision was based on the results which had been obtained in a past period from tariffs which, as the board declared, "were, as to level of fares and governing rules and regulations, substantially similar to those under investigation in this proceeding."[44] The finding of unreasonableness rested on the conclusion that the amount of "new" traffic generated (representing an addition to total revenues) would not be sufficient to offset the diversion from standard-fare carriage occasioned by the availability of the excursion fares.[45]

Despite the Board's declaration that "In evaluating the reasonableness of fares we must examine their relationship to cost," the treat-

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[42] *Ibid.*, p. 4, where the Board also stated: "Each carrier having in effect a promotional tariff will be required to maintain an adequate statistical record of the results of the fare, reporting this information to the Board on a monthly basis. In this manner, we hope to have a firm statistical basis for determining whether the various types of promotional fares under consideration should become a permanent part of the passenger fare structure of the domestic air carriers."

[43] Orders Serial Nos. E-4037 (April 3, 1950) and E-4132 (May 4, 1950).

[44] Orders Serial No. E-4037, pp. 4-5.

[45] The evidence on which this conclusion was based was summarized as follows in Orders Serial No. E-4132, pp. 3-4: "The record shows that between excursion fare points Eastern and National, combined, performed 124,176,000 revenue passenger miles during the summer of 1947 and 115,944,000 revenue passenger miles during the comparable period in 1948, when no excursion fares were in effect. [The low figure for 1948 was due to a strike.] In the summer of 1949, when excursion fares were in effect, 134,261,000 revenue passenger-miles were flown, including excursion fare passengers. The increase in total 1949 summer traffic over 1947 summer traffic was, therefore, approximately 10 million revenue passenger-miles; and over 1948 summer traffic the increase was approximately 18 million revenue passenger-miles. Total excursion fare traffic during the summer of 1949 amounted to approximately 79 million revenue passenger-miles. Regular fare traffic therefore declined 61 million revenue passenger-miles as compared with 1948 and 69 million revenue passenger-miles as compared with 1947.

"It is our conclusion, based upon the evidence of record, that the increase in traffic in 1949 attributable to the excursion fares was less than 18 million revenue passenger-miles, because it is reasonable to assume, on the basis of industry experience, that there would have been some increase in regular fare traffic even if excursion fares had not been available. If the excursion fares had succeeded in developing new traffic without substantial diversion the increase in total traffic would have been more nearly commensurate with the total excursion fare traffic carried. It is also our conclusion that the substantial decline of regular fare passengers in 1949 is indicative of substantial diversion occasioned by these fares."

ment of the cost issue in this proceeding was confined to a rejection of the "added-cost" theory advanced by the carriers;[46] there was no positive statement as to the costs which *should* have been covered by the fares in question in order that they be reasonable; and this question was, of course, irrelevant in view of the major aim of the decision. Moreover, in view of the statistical evidence presented, the Board was justified in not devoting more attention to cost considerations, for this evidence appears to support a conclusion that the excursion fares most probably resulted in a net loss regardless of such considerations. In general, it would be necessary to balance the loss on diverted traffic (which, in the absence of any difference in cost of service between the two types of traffic, and of any economies through a more even spread of traffic over time as a result of the diversion, can be measured per unit by the difference between average revenue at standard fares and average revenue at excursion fares) against the *net* revenue from the new traffic generated, a calculation which would necessitate the ascertainment of the costs to be subtracted from the gross revenue from the new traffic. But whatever this net might be, it would be appreciably smaller than the *gross* revenue from the new traffic; in this particular instance the evidence seems to show that this *gross* figure was probably at any rate not much larger than, if as large as, the loss occasioned by diversion.

The excursion fares were apparently found to be unjustly discriminatory *on the basis of the same statistical evidence which supported the finding of unreasonableness,* which evidence was here used to prove that "the limitations upon the users of such fares affected only a minor part of the traffic,"[47] and hence that the different fares were being charged for "substantially similar services."[48] This interpretation would make the issue of unjust discrimination hinge upon the proportion of the traffic deterred from using the excursion fares by the limitations under which they were offered — i.e., the proportion of the traffic traveling at standard fares which would continue so to travel after the excursion fares had become available, a proportion which is inversely measured by the diversion from the regular fare service. In subsequently suspending judgment on the issue of unjust discrimination, the Board held that this issue could not be settled in advance of actual experience with the fares involved. This position was adopted in connection with the Board's indicated tentative approval of excursion fares substantially similar to those disallowed except that they were to be in effect for a shorter period.[49]

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[46] Orders Serial No. E-4037, pp. 7-9.

[47] Orders Serial No. E-4132, p. 5.

[48] Orders Serial No. E-4037, pp. 10-11.

[49] Orders Serial No. E-4137, pp. 5-6: "National and Eastern urge that our finding on discrimination applies to all excursion fares and that this finding is contrary to applicable law and is based upon a misapplication of the principles without consideration of the practicalities of the situation.

"In our tentative opinion we found that under these particular fares, excursion fare passengers and regular fare passengers each would receive substantially

This interpretation, although in this case providing a convenient reinforcement of the Board's finding of unreasonableness in the interest of maximizing net revenues, would not always necessarily operate to this ultimate end. Thus, a particular proportion of traffic diverted from regular fares might in some instances be associated with a promotional fare which would decrease net revenues, and in others with a promotional fare which would increase them. Although, as has been noted above, (and under the noted conditions), diversion itself represents a loss which would have to be offset by net revenues from new traffic, a given proportion of diversion may evidently be more than offset in some instances and less than offset in others.

The Board's particular criterion of discrimination is, as far as this writer has been able to determine, unique in regulatory history. Nevertheless, it represents a not unreasonable particularization of a traditionally accepted criterion and would thus appear to be legally defensible. Such legal difficulties as may arise may more probably result from possible attempts by the Board itself to reconcile the stated criterion with maximization of profits under varying economic conditions. It would be too much to say that the Board's lawyers would be so devoted to substantial precedent as to be unable to supply justification for contradictory doctrines in dealing with such cases; however, it is within the realm of possibility that some court might be unable sympathetically to comprehend the requisite legal contortions.

As for the doctrine of reasonableness here employed by the Board, there is ample precedent in recent regulatory history for the interpretation of this legal requirement to compel policies regarded by the regulators as more profitable than those proposed by the regulatees;[50] however, the Commission has been generally reluctant so to revise managerial judgment,[51] and the Board's failure to consider more fully the relationship between the revenues obtained under the disallowed

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similar services with a fare differential beneficial to the excursion fare passenger . . . Our finding does not *per se* render unlawful other reduced fares of a promotional nature which carriers may wish to file. It is true that the excursion passengers would not receive the full privileges of a regular fare passenger. The most important limitations on the excursion fare round-trips permitted in our tentative opinion are that the passenger must complete his round-trip in 21 days and that the round-trip must be made during the limited period of July 5-August 31, 1950. Whether these differences in privileges have any substantial effect on the services offered or are mere paper differences is a question of fact. The record in this proceeding suggests that the differences in service do not make practical differences. Upon reexamination of this record, however, we believe the facts are not sufficiently conclusive, and we will, therefore, defer our judgment on the question of unjust discrimination until the completion of the limited experiment with excursion fares for the period July 5-August 31, 1950. We propose to require the filing of complete reports of the operations under such excursion fares so that we may be in a position to ascertain whether the limitations placed thereupon are in fact substantial, justifying the difference in fare levels."

[50] See, for example, *Passenger Fares and Surcharges*, 214 I.C.C. 174 (1936).

[51] D. P. Locklin, *op. cit.*, p. 109: "Minimum rates are frequently prescribed, or proposed reductions are disapproved, when collateral losses of revenue to the carriers proposing the rates seem likely to offset revenue from new traffic to be obtained by the reduced rates. This frequently happens when reductions are proposed for competitive reasons, even though a considerable volume of traffic moves by the carrier in question at the higher rates. Cases are not difficult to find

fare structure and relevant costs leaves it open to the charge of throwing an "undue burden" on the affected traffic.

The treatment of the discrimination issue here, while on a much subtler level, reflects the same broad approach as the treatment accorded it in *Air Passenger Tariff Discount Investigation*, 3 C.A.B. 242 (1942). Here the so-called Air Travel Card Plan and a similar volume discount arrangement open to U. S. Government employees were found not to

> give rise to any undue or unreasonable preference or unjust discrimination; and [to be] . . . just and reasonable classifications, rules, regulations and practices . . . except in details and with modifications indicated.

The favorable effect of the discounts on carrier traffic and revenues was given major emphasis in the opinion. Despite the recognition that the benefits of the volume discount were probably not uniformly applied to all passengers who spent the required minimum on air transportation, the classification was found not to result in unjust or unreasonable rates, "considering the impetus that subscribers have given to the development of air transportation by taking advantage of the plan" (p. 250). On the discrimination issue, the Board cited a catch-all Supreme Court statement admitting every possible factor to be relevant in the determination of this issue, and then declared (p. 251):

> Viewing the issues here in that light, it appears that there is no competitive relationship in the customary sense between the classes of traffic involved, that the reduced rates are reasonably open to all, that the Plan constitutes a convenience and benefit to a considerable part of the traveling public, that the interests of the carrier are reasonably promoted, and that the difference in rates is not clearly improperly adjusted with reference to the actual savings and profit to the carrier flowing from the Plan.

In *Government Travel Discount Tariff Investigation*, 6 C.A.B. 825 (1946), the Board declared that discounts for official government travel as well as for personal travel of government employees "eventually should be eliminated in their entirety" (p. 832). This decision, however, did not reverse the broad stand previously taken in this connection; on the contrary, it embodied the view that the differential fare policy was justifiable to the extent (and only to the extent) that it constituted a sound promotional device (p. 832):

> Even if such discounts were justified in the past as a device to promote the development of air transportation, they now have outlived their usefulness for such purpose and should be abandoned as rapidly as circumstances will permit. Such a removal of inequali-

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in which rate reductions have been prevented because of the collateral losses. The Commission recognizes, however, that the question of whether a reduction in rates on particular items of traffic will increase or reduce revenues cannot be determined with certainty. Since the question is one which is primarily within the province of management, the Commission is not likely to interfere on the grounds that the revenue results are uncertain." (Supporting citations omitted.)

> ties in the fare structure not only is in accord with the provisions of the Civil Aeronautics Act regarding discriminations, but also creates a sound basis for reductions in the level of fares for all classes of passenger traffic.

It is highly significant that in this proceeding the carrier maintained that the discounts, although profitable in the past, had now become a losing proposition.[51a]

Northern Consolidated Airlines' Passenger Excursion Fares

Similar issues were involved in *Northern Consolidated Airlines' Passenger Excursion Fares,*[52] where the "reasonableness" concept was employed to limit the period for which certain promotional fares proposed by an Alaskan carrier in order to develop tourist and vacation travel during an off-peak season should be applicable, and both this concept and that of "undue preference and prejudice" were used to increase the average fare level for this travel as compared with that proposed by the carrier. On the first point, cognizance was first taken of the fact that available flights were being operated at low passenger load factors, and that little increase in cost would be occasioned by aditional traffic to the extent that it was accommodated on these flights. "On the other hand," the Board continued, (pp. 5-6):

> "it is not clear that the increased traffic which Consolidated hopes to generate will, in fact, offset the reduction in its revenues occasioned by diversion of traffic from the regular fares . . . [however] we are sympathetic with Consolidated's proposal to experiment with lower promotional fares and believe it desirable to give the carrier's management an opportunity to make a fair test of the potential traffic under lawful promotional fares . . . It is likely that the end of the tourist season will cause the proposed fares to reduce Consolidated's gross revenues and, accordingly, we cannot now find that the fares are reasonable for the period subsequent to September 3, 1950 . . . Therefore, we will require that the promotional fares under consideration be cancelled, without prejudice to Consolidated's right to refile promotional fares, with such other revisions as are indicated herein, with an expiration date of September 30, 1950.

The principle here involved is evidently the same as that in *The Summer Excursion Fares Case*, discussed above.

Similarly, the test of discrimination by the proportion of regular-fare traffic likely to be affected by the limitations on the availability of the excursion fares was applied to the "undue preference and preju-

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[51a] P. 830: "Pan American pointed out that the need for a government discount to enable air transportation to compete with established surface transportation had entirely disappeared, and that the discount now was a serious liability to it. It introduced evidence to show that increases in the amount of government travel meant a reduction in its Latin American revenues in 1943 of over $1,300,000 resulting from use of the discount."

[52] Orders Serial No. E-3958 (March 3, 1950.)

dice" concept in the Northern Consoliated opinion;[53] but it was not upon this concept that the findings of undue preference and prejudice were based. In one instance this finding seems to have been based on an estimate of difference in value of service which was simply declared to be less than that implicitly put forward by the carrier;[54] in another, this finding (and a finding of unreasonableness) was related to a disregard of distance relationships in the construction of some of the round-trip rates, resulting in fares "totally unrelated to costs of operation and the value of the service."[55] The issues raised here are essentially the same as those in *The Hawaiian Common Fares Case*[56] now to be discussed.

The Hawaiian Common Fares Case

In this proceeding, a proposed tariff blanketing fares to Hawaiian points from the mainland was found unreasonable and unduly preferential and prejudicial. The effect of this blanketing was not only to afford substantially varying amounts of transportation for the same money[57] but to bring about "a fare reduction ranging from $6.50 to $13.50 in the through fare from common fare West Coast cities to the outer islands,"[58] and a consequent reduction in yields per revenue passenger mile amounting to as much as 8 percent.[59] In spite of a showing by the chief proponent carrier (United)[60] that its fully-allocated costs would be covered by total revenues (there being included in the calculation the mail revenues at the rate then in effect), the rates were found unreasonable because (a) the Board thought it unlikely that the costs of Pan American and Northwest would be covered, (b) all three of the carriers were requesting higher mail payments for their operations as a whole, and (c) the approval of rates constructed on the blanket principle would provide a precedent for

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[53] *Ibid.*, pp. 7-8. "In the absence of data which would justify the fare differentials between two one-day fares and the ten-day round-trip fares and between the regular one-way fares and the ten-day 'open-jaw' and 'circle' fares, it would appear that the proposed fares unduly prefer the ten-day passengers and unduly prejudice the regular fare passengers . . . however . . . Regular fare tickets are valid for one year. Tickets under the proposed tariff are valid for only ten days. *The record shows that fewer than 19 percent of Consolidated's passengers completed their trips within ten days.* Thus, some differential in fare seems to be justified, it being obvious that the one-year ticket is worth something more than the ten-day ticket." (Emphasis supplied.)

[54] *Ibid.*, p. 8: "We believe that the maximum differential justified by the difference in value of the two types of services provided is not in excess of 37½ percent of the one-way fare, *i.e.*, we believe those ten-day 'circle' trip and 'open-jaw' trip fares which are less than 62½ percent of the regular one-way fares and that those ten-day round-trip fares which are less than 125 percent of the applicable one-way regular fares are unduly preferential and prejudicial."

[55] *Ibid.*, p. 7.

[56] Orders Serial No. E-3625 (November 29, 1949) and E-3965 (March 6, 1950).

[57] Brief of Public Counsel to the Civil Aeronautics Board, p. 8: ". . . a passenger from San Francisco can fly as much as 8.3% more mileage for the same fare . . ."

[58] *Ibid.*, p. 6.

[59] *Ibid.*, p. 15.

[60] Identical tariffs filed by Pan American and Northwest were withdrawn when the Board suspended the fares.

further approval of similar rates in similar circumstances; and the Board believed that such a fare-making principle

> by which varying amounts of transportation are furnished for the same money under similar conditions inevitably results in a fare structure which will invite economically unsound conditions.[61]

The Board nevertheless expressly left the way open for the approval of such fares as reasonable where it could clearly be shown that net revenues would be increased by them.[62] In support of its belief that in this particular case net revenues would not be increased, the Board pointed to the fact that a recent *increase* in the rates commensurate with the proposed effective reduction had failed to result in a decline in total traffic, and to the weakness of the evidence presented by the carriers on this point.

The reasoning as to undue preference and prejudice, however, does not seem quite so well adapted in principle to the Board's purposes. Although it was not unequivocally stated that any fare structure involving common fares for consecutive points would be *ipso facto* unduly preferential and prejudicial, it was indicated that such a fare structure would be so found "unless justified by special circumstances, among which may be compelling competitive relationships between carriers which require the carrier to grant the preference to the farther moving passenger in order to obtain the traffic, or actual differences in cost of service, or similar recognized transportation standards,"[63] and that these "special circumstances" would not include a long-run increase in the traffic of the carrier.[64] Thus it is conceivable that a strictly consistent application of this interpretation might embarrass the Board in some future proceeding where fares of this nature would clearly increase carrier profits.

On this issue, regulatory precedent again seems adequately in accord with the Board's action, despite numerous instances in which group rates have received I.C.C. sanction, and despite the fact that the Commission has habitually laid an especially heavy burden of proof

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[61] Orders Serial No. E-3965, pp. 3-4. See also Orders Serial No. E-3625, p. 6: "Generally, we feel that a sound fare structure for consecutive points on a route requires that the respective fares increase with distance because costs increase with distance, and that a departure from this principle will tend to lessen the revenue of the carriers, weaken their economic position, and impair their capacity to render adequate and efficient service. Ordinarily, therefore, we believe common fares applied to consecutive points are unsound in principle . . ."

[62] Orders Serial No. E-3965, pp. 4-5: "Compelling competition from other carriers requiring the same fare for a longer distance may be one possible justification [for common fares to consecutive points], but such a justification is not found in this record. A clear cut showing that in the particular circumstances, this generally unsound fare structure will nevertheless improve the revenues and strengthen the economic position of the carriers may possibly be another, but in our opinion the record is not convincing on this point. The carriers' witnesses and the witness for the Hawaiian Visitors' Bureau did, it is true, forecast increased tourist traffic from the ability to offer a single fare 'package' to all the islands, but the basis for this hopeful prospect appears to us highly speculative."

[63] Orders Serial No. E-3625, p. 9.

[64] *Ibid.*, p. 10.

(notably in connection with the showing of injury) on parties attacking such rates under Section 3 of the Interstate Commerce Act.[65] The finding of undue preference and prejudice between localities competitive for tourist traffic on the basis of a rather speculative showing of potential injury[66] was contrary to the Commission's general practice in the specific application of Section 3 to group rates, but not to its usual construction of this Section. The inapplicability of the traditional requirement of competitive relationship to preference and prejudice *as between passengers* (also here found by the Board) has, as the Board pointed out, already been affirmed by the Supreme Court.[67]

However, it should perhaps be reemphasized that the main concern of the Board in attacking blanket fares has been the belief that they operate to reduce net revenues; here, as in the statement on domestic fares shortly to be discussed, the Board aimed directly at an upward revision of the proposed or actual blanket fares applying to longer distances, rather than a correction of the fare relationship as such. This approach may be contrasted with that of the I.C.C., which regards it as of the essence of undue preferences and prejudice that it may be corrected either by an increase in the preferential rate or a decrease in the prejudicial one.[68] The contrast, though obviously insignificant in

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[65] Dr. Sharfman has noted that the tolerant attitude of the Commission toward such group rates, although in part justified by transportation factors, seems also partly based on commercial considerations which the Commission generally refuses to recognize. He has summarized the Commission's position as follows (*op. cit.*, pp. 673-674): "It [the Commission] has maintained the position early enunciated 'that the propriety of its [*i.e.*, the group rate principle's] application is properly open to challenge in every case'—in other words, that group rates constitute one of the arrangements which may be permitted where circumstances warrant, but which will not be required. But to an extent not ordinarily manifest where individual carriers adjust rates to attract traffic, the Commission has often revealed a positive sympathy with the practice of blanketing rates on an equal basis, sometimes over considerable areas. This sympathy has not extended to the point of imposing group rates, except where the blanket principle has met with general approval as a solution for a chaotic rate situation, and in circumstances in which, the practice having already been adopted by the carriers, its uniform and equitable application has been required. It is apparent, nevertheless, that when group rates are attacked as unduly preferential of the furthest removed sections of an area and unduly prejudicial to nearer points, the Commission imposes an especially heavy burden of proof upon complaining parties. It insists, in particular, that proof of injury be positive and substantial. The obvious presumption that the failure of rates to correspond to transportation service creates in itself a discriminatory situation seems to have carried but slight weight. Absence of injury has been shown through submission of evidence that the market is capable of absorbing the volume of product carried to it, and that the rates to the more remote points are compensatory. The existence of injury appears to have been determined through a process of balancing the gains to some as against the losses to others arising from the group arrangement, without the usual care, it seems, in recognizing that it is of the very nature of a preferential relationship that it bestows benefits and hence is not to be justified thereby." (Supporting citations omitted.)

[66] Orders Serial No. E-3625, pp. 9-10.

[67] *Ibid.*, p. 8.

[68] See, for example: (1) *Utah State Automobile Association v. A. T. and S. F. Ry. Co. et al.*, 92 I.C.C. 376, 386 (1924): "Doubtless complainant would be benefited by a reduction in the rates on gasoline, but preference in and of itself can be eliminated by raising the lower rates as well as by reducing the higher rates. It is, therefore, clearly pertinent in determining this question of injury alleged to

terms of legalistic justification of the Board's action, is a revealing one in that it brings out the novelty of the Board's use of this category.

In addition, the Commision and the Courts have held that a *presumption* of unreasonableness attaches to a higher rate for a shorter than a longer haul on the same line,[69] a position which could logically be extended to provide support for the Board's general view that special justification is needed for the practice of charging the same rates to consecutive points.

The use of the costs of competitive carriers as a criterion of reasonableness is perhaps open to some question in terms of regulatory precedent. It is true that the power of the Commission to prescribe rates to cover the expenses of higher-cost competitors has been confirmed in a decision of a Federal Court,[70] but a contrary view has been implied in a Supreme Court decision where this use of the Commission's power was not directly at issue.[71] However, the apparently contrary doctrine recently enunciated by the Commission (in connection with the amended rule of rate-making in the Transportation Act of 1940)[72] is evidently not applicable to competition between air carriers; the crucial new phrase – "by the carrier or carriers for which the rates are prescribed" – is *not* included in the rule of rate-making in the Civil

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flow from preference, to consider whether or not complainant would be better off if the rates on the crude oil were made higher."

(2) *Duluth Chamber of Commerce v. C., St. P., M. and O. Ry. Co.*, 122 I.C.C. 739, 742 (1927): ". . . to prove that this discrimination results in a violation of section 3 it must be shown that complainant suffers injury by reason of the discrimination, and that this injury will cease if the discrimination is removed, regardless of the manner of its removal."

[69] *Patterson v. Louisville and Nashville R.R. Co.*, 269 U.S. 1, 11 (1925): "Apart from statutory enactment it is *prima facie* unreasonable to charge more for a shorter than for a longer haul." On this point, see D. P. Locklin, *Economics of Transportation* (Chicago, Richard D. Irwin, Inc., 1947), pp. 474-475.

[70] ". . . since the passage of the Transportation Act of 1920, the Commission has the right to prescribe minimum rates, and we agree with the Commission that a construction of the law is too narrow which limits its right to prescribe such rates to cases where the rates proposed are unreasonable *per se*, or are so low as to cast a burden on other traffic. It has the right to prescribe minimum rates also to prevent ruinous rate wars and to guarantee reasonable earnings, not only to the carriers affected, but also to competing carriers, who may labor under a higher cost of doing business." *Anchor Coal Co. v. United States*, 25 F. (2d) 462, 471-472 (1928).

[71] "The evidence failed to show that the rates of the Texas and Pacific and the L. R. and N. . . . were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic. There was therefore no basis for an order fixing minimum reasonable rates under section 15(1) of the Act." *Texas and Pacific Ry. Co. v. United States*, 289 U.S. 627, 633 (1933).

[72] See, for example, *Seatrain Lines, Inc. v. Akron, C. and Y. Ry. Co. et al.*, 243 I.C.C. 199, 214 (1940): ". . . the rule of rate making in section 15a has been recently amended so as to require us, in the exercise of our authority to prescribe just and reasonable rates, to 'give due consideration, among other factors, to the effect of rates upon the movement of traffic *by the carrier or carriers for which the rates are prescribed* . . .' This admonition is repeated in Sections 216(i) and 307(f), containing rules for rate making relating to motor and water carriers, respectively. The words which have been italicized for emphasis are of particular interest. They were not in either of the bills originally passed by the Senate and the House of Representatives but were added by the committee of conference. Their meaning, supported also by the legislative history, seems to be that no carrier should be required to maintain rates which would be unreasonable, judged by other standards, for the purpose of protecting the traffic of a competitor."

Aeronautics Act. It is perhaps worth noting that although the Commission has regarded average costs of all carriers within a given region as a proper consideration in the prescription of general regional rate floors for motor carriers,[73] it has subsequently regarded the costs *of the carrier proposing a rate* as a significant test of compensatoriness, even though the rate were below the previously prescribed minimum.[74]

In so far as the Board's finding of unreasonableness was based on the anticipated effect of the proposed effective fare reduction on the net revenues of United's entire system, it raises the same problems as were discussed above in connection with possible low-net coach fares on relatively high-traffic segments. Here, however, the question of the "system need" mail payment obtrudes itself directly: The Board emphasized the fact that, although the proposed fares were not expected to result in a need for additional mail payments on the segment of United's system to which they applied, such payments were being sought by United and by the two competitive carriers for their entire systems. It was not expressly contended that either the payments on United's Hawaiian segment or, indeed, the additional payments being sought were higher than a reasonable compensation for the mail service rendered. However, it is unmistakably implied that the existence of the petitions for higher mail rates in some way justified the maintenance of passenger yields at a higher level than might otherwise be allowable. It is obvious, of course, that where mail payments are determined so as to equal the excess of total costs over commercial revenues, the maintenance of commercial profits at the highest possible level — i.e., the enforcement of a monopolistic price policy — will, other things being equal, result in the smallest bill to the government. In this context, the fact that a particular service, or indeed, the entire system, might be a self-supporting on legitimately earned mail payments and commercial revenues at a non-monopolistic level[75] is quite irrelevant

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[73] *Central Territory Motor Carrier Rates*, 8 M.C.C. 233, 256 (1938): "It is impracticable to prescribe rates based upon the costs of individual carriers or groups of carriers. To do so would only perpetuate the destructive competitive practices which now prevail. Necessarily, the rates which we prescribe are affected by cost and they must be based upon the average cost of all carriers handling the various kinds of traffic."

[74] D. P. Locklin, "Rates and Rate Structure," p. 113: "The effect of prescribing minimum rates over large areas is to prevent some rates which might be justified by the low costs of particular operators. The Commission, however, is not committed to uniformity in rates by all motor carriers competing for the same traffic or serving the same general area."

James C. Nelson, "New Concepts in Transportation Regulation," *Transportation and National Policy*, p. 229: "Perhaps the chief test of reasonableness employed has been whether truck-mile revenues from a proposed rate would be sufficient to cover average costs of some type, often the carrier's truck-mile costs. For our purposes it is sufficient to note that the historical average cost of the proposing carrier is commonly, though not universally, regarded as a significant test of whether a proposed rate is compensatory." (Supporting citations omitted.)

[75] This was not, of course, shown for the Hawaiian segment of United's system, because (a) the cost calculations were not intended to show the expense of maintaining this segment as an independent unit and (b) the mail revenues were not shown to be no more than reasonable compensation.

in determining commercial rate policy as is, indeed, the whole question of legitimate mail revenues. But however commendable the conservation of Government funds may at first sight appear to be as an object of public policy, it is open to serious question as an ultimate guide in transportation rate-making. The problems which arise in this connection will be more thoroughly treated at a later stage of the discussion.

Suggested Fare Policies Initiated by the Civil Aeronautics Board

In *The Hawaiian Common Fares Case* (in which the tentative opinion was issued in November, 1949), one of the points brought up by the carriers in defense of the proposed blanket fares was the fact that such fares were already in existence for other services (of varying distance) under C.A.B. jurisdiction. In response to this argument, the Board pointed out that it had neither investigated nor formally approved any of these fares: "It may be," the Board continued, "that an investigation might disclose that some or all of such common fares are unlawful." The existence of such fares was moreover held to be irrelevant "in the absence of any evidence that the circumstances and conditions affecting the existing common fares are similar to those affecting the proposed fares."[76] Public counsel furthermore expressed the view "that the existence of the common fares on the West Coast is unsound in principle, costly to the carriers involved, and unfair to communities and passengers," and quoted a letter from the President of United Airlines to the effect that United was losing from 4 to 6 million dollars a year in revenue as a result of transcontinental rates figured on the New York-Los Angeles mileage.[77]

On February 3, 1950, Board Chairman O'Connell addressed to the carriers a letter stating that "a study of the entire problem of the construction of domestic passenger fares" was about to be begun by the Board's staff, and requesting carrier views on "three immediate possibilities for tariff adjustment":

> (1) the placing of all fares on a mileage basis; (2) discontinuance of the meeting of fares over circuitous routings when the circuity exceeds 20 percent; and (3) providing that when stopovers are made, the fare for the total journey be computed by combining the individual fares between the points visited by the passengers.

The Chairman enclosed a statement prepared by the staff of the Board dealing with fares by circuitous routings, common fares, and fares for passengers utilizing stopover privileges, and requested comment on this statement.

The general objective of the proposed fare revisions is made quite clear in the text of the statement. Thus, the three tentative recommen-

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[76] Orders Serial No. E-3625, pp. 10-11.
[77] Brief of Public Counsel, p. 14.

dations mentioned by Mr. O'Connell are explained as follows (pp. 3-4):

> While this entire matter [i.e., the application of fare-making concepts originating in surface transportation] is presently being studied, it appears that certain immediate steps should and can be taken in an attempt *to remedy those situations having the most harmful effect on the carriers' financial results.* (Italics supplied.)

Again, in discussing the origin of common fares in the competitive principle of equal fares between the same points by different carriers over different routes (combined with the principle that no fare to an intermediate point or a given route should be higher than the fare over the entire route) the statement concludes (p. 2):

> Competition between carriers is of course highly desirable, and no effective competition would exist if carriers could not charge the same fares for travel between the same points. The practice of meeting fares between competitive points, however, *does reduce the average revenue yield of the longer route carriers and in some cases this reduction is very substantial.* (Italics supplied.)

The practice of granting stopovers at no additional charge — specifically, stopovers at common fare points — was also considered from the point of view of its effect on carrier profits.[78] Although the staff had found it impossible "to analyze the foregoing factors in terms of their effects on the financial results of the carriers," it noted that United Air Lines had "submitted information showing that for the six months ended May 31, 1949 its revenues could have been reduced by $751,346 as the result of the Chicago-West Coast fare structure" (p. 2).

In point of fact, the staff did prepare an estimate of the additional revenue which could be obtained from traffic between New York, Boston, Washington and Chicago on the one hand and certain West Coast points on the other, if (1) the fares between Chicago and the West Coast points were constructed on a 6-cent-per-mile uniform basis (using the shortest air carrier route as the fare-making route) subject to a $113.75 minimum (the present fare, which worked out to something more than 6 cents a mile between Los Angeles and Chicago), and (2) the fares between New York, Boston and Washington and the West Coast points were constructed on a similar 6-cent basis subject to a minimum equal to present fares and to a maximum equal to the Chicago combination (using the above suggested Chicago-West Coast fares). This estimate was made by employing the stunningly simple assumption that no change in volume of traffic would result from the

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[78] Almost all of the carrier representatives who commented on the Board's proposals were opposed to the elimination of the stopover privilege. As to the effect of this practice on expenses it was variously stated (a) that stopovers entailed very little extra cost and (b) that the elimination of the stopover privilege might itself give rise to confusion and added costs in ticketing procedure. The opinion was almost universally held that the stopover privilege was a great "selling point" and that its elimination would result in diversion of traffic to surface carriers.

proposed fare increases.[79] From it the staff drew the following unqualified conclusion (Appendix No. 1, p. 7):

> Upon this basis we may assume [not presume] that transcontinental airlines are losing $1,111,381.76 annually on traffic between three Pacific gateways, on the one hand, and Chicago, New York, Boston and Washington on the other.

The blanketing of fares to West Coast points other than gateway cities was also attacked and the suggestion made that certain of these fares be constructed by addition of local fares to fares to gateway cities. (Appendix No. 1, pp. 7-9.)

In addition to its effect on average revenue, the statement pointed out, the practice of charging equal fares over circuitous routes competitive with more direct routes may result in higher costs of carriage than would be experienced under a direct routing of all traffic. (p. 3). Thus the proposed limit of 20 percent on permissible circuity without a fare difference was supported by reference to possibilities of lower unit costs as well as higher unit revenues.[80] It was also pointed out that stopovers "result in additional costs occasioned by complicating the

[79] Of particular interest in this connection are the following comments submitted by Mr. E. O. Cocke, Vice President—Traffic, T.W.A. (Letter to the Director of the C.A.B.'s Bureau of Economic Regulation, dated March 31, 1950): "If the fares to certain Pacific coast points were raised, as suggested in the statement attached to the letter . . ., the amount of traffic lost to the rail carriers alone would undoubtedly more than offset any possible increase in revenue from those passengers who continue to travel by air to Pacific coast points. It is estimated that as far as TWA is concerned, the theoretical loss of revenue resulting from the use of common rate points is approximately $20,000 per month. This is equivalent to only about 75 round-trip transcontinental passengers so that if the elimination of common fare points (with the resulting increase in fares) would divert as many as 2½ round-trip passengers a day to the railroads or would otherwise take these passengers from TWA, there would be a net loss of revenue to TWA."

It is also significant that Mr. Patterson himself appeared far from enthusiastic about the proposed revision of fares to major West Coast cities. He advised the Board to study thoroughly the history and background of the common-fares practice before taking any action, and said: "We are of the opinion the Board can never successfully dispose of the theory of common rates." (Letter to Board Chairman O'Connell, dated March 31, 1950.)

[80] It might appear unnecessary to guard against genuinely wasteful competition if the competing carriers were trying to maximize profits; actually, the I.C.C. has thought it necessary to place limits on circuity in railroad routes permitted relief under Section 4 in order to meet competition. Dr. Locklin has discussed the Commission's treatment of this problem as follows (*Economics of Transportation*, p. 555):

"The degree of circuity must not be too great, however. Not only does the through rate become less than reasonably compensatory over an extremely long route, but the transportation of goods by an extremely circuitous route is wasteful. The Commission very often restricts fourth-section relief to lines that are not more than 70 or 80 percent circuitous. In some cases the degree of circuity permitted varies with the distance of the direct route. A typical case of this sort limited the degree of circuity to not more than 70 percent when the distance by the direct route was 150 miles or less, to 50 percent when the direct route exceeded 150 miles but did not exceed 1,000 miles, and 33⅓ percent when the direct route exceeded 1,000 miles. In other cases the Commission has limited relief to routes over which the proposed through rates would yield 5 mills per ton-mile or more . . . Still other methods of restricting circuity have been used." (Supporting citations omitted.)

On the face of it, it would appear that the prescription of a minimum yield approximately equal to out-of-pocket costs would be preferable to a rigid percentage limitation, if it is desired to approach the problem of maximum circuity on a rule-of-thumb basis.

In this connection, it is significant that the consensus of the carrier represen-

ticketing and reservations procedures in relation to what would be necessary for a through trip" (p. 3).

It is perfectly obvious, however, that the main purpose of the suggestions offered was not the achievement of a system of rates based on costs, but the increase of carrier profits through selective rate increases and (if necessary) the withdrawal of certain relatively unprofitable services. Thus, no consideration at all was given to the propriety in terms of absolute costs of the proposed fares to West Coast points, or to that of the present fares accepted as minima in their construction. The more detailed reflection of distance relationships by means of a reduction in fares for shorter distances rather than by the increases of fares for longer distances was likewise not considered. The proposed adjustment of fares to vary with distance served rather as a convenient and plausible method of increasing the effective fare level and thus adding to net revenues.

As has been noted, the staff report calculated the effect on commercial revenues of the proposed fare increase between certain points on the basis of an assumed totally inelastic demand for the services in question.[81] Under this assumption, there would also be no change in the total cost of service, so that the calculated increase in gross revenues could be taken to equal an increase in net revenues. As a general rule, however, it would seem necessary to take into account in this type of calculation the possibility that the traffic might decline in some ratio to the fare increase; in this event, the gross revenues would not rise in direct proportion to the fare increase, and the calculation of the resulting change in net would furthermore have to take into account the (possibly less than proportionate) change in total cost attendant upon the decline in the volume of traffic. It would therefore appear advisable for the Board to proceed with caution in prescribing strict distance relationships between fares in all instances or attributing to such relationships an absolute value not subject to correction by a detailed consideration of the financial effects of their application in any given situation.[82]

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tatives commenting on the Board's proposals was opposed to a rigid percentage limitation on circuity; even those who thought that some limitation might be necessary to prevent managerial indiscretion generally favored individual treatment of specific instances by the Board. Several pointed out that the quotation of equal rates over circuitous as compared with more direct routes had in fact enabled them to utilize more fully capacity on schedules which would in any case have had to be operated to serve intermediate points, with consequent improvement in load-factors and in net earnings.

[81] In this connection, one wonders if the Board's staff or Mr. Patterson has ever figured out how much it "could have cost" the carriers to calculate fares on the present basis—or, indeed, on a straight 6-cent mileage basis—as compared with, say, a straight mileage rate of 10 cents, or a "tapering" rate beginning at 10 cents per mile for short hauls, or a reverse taper (justified in terms of relative value of service) beginning at 6 cents, etc., etc.

[82] It should be noted that no carrier representative commenting on the Board's proposals favored the placing of all rates on a straight mileage basis. One such representative characterized this proposal as the "Utopian dream of all rate analysts" (Letter from Sigmund Janas, Jr., Vice President—Traffic, Colonial Airlines, to the Director of the C.A.B.'s Bureau of Economic Regulation, dated April 14, 1950). Among the factors mentioned as making this proposal inadvis-

Since the proposals advanced here were in the nature of suggestions rather than orders, the question of legality or conformity to regulatory precedent is not practically significant. It is perhaps worth pointing out, however, that even under the present regulatory regime for surface transportation, where the financial welfare of the carriers seems to be recognized as an aim of coordinate importance with the protection of the shipping or traveling public,[83] the I.C.C. has usually adopted a more passive role than that taken by the Board in this instance; it has not generally felt called upon to initiate drastic changes in price policies in order to increase the profits of the regulatees.

On July 18, 1950, after having received the comments of the carriers on its proposed revisions in fare policy, the Board instituted a formal investigation to determine the lawfulness of the airline fare structure to and from points on the West Coast, including classifications, rules, regulations and practices relating to such fares, and, in the event that any of these should be found unlawful, to determine and prescribe lawful fares, practices, etc. to replace them.[84] The selection of the West Coast fare structure for special investigation was explained as follows in the opinion accompanying the above-cited Order (pp. 2-3):

> For reasons of administrative expediency . . . we have included for initial action in this proceeding only those pairs of points comprising the most important areas where these fare situations [deemed by the Board to be possibly illegal] are prevalent. We recognize that the matters we propose to investigate . . . are only symptomatic of the over-all problem. We believe, however, that our investigation in this limited area may well provide a basis for later adjustment of other similar fare situations to the extent it may appear to be necessary.

This proceeding (Docket No. 4586) may, of course, result in positive action by the Board which will raise important questions related to regulatory precedent. At the present time, however, it is impossible to foresee the precise nature of the issues which may be involved.

Conclusions

In general, the recent activities of the Board in connection with commercial rates appear to be supported by regulatory precedent in

able or impractical were the following: varying average costs on different routes on any given carrier's system; necessity for meeting competition; and necessity for charging the same fare between the same two points on nonstop and local schedules.

[83] On this point, see James C. Nelson, *op. cit.*, pp. 197-204. The following quotations are illustrative:

(1) p. 201: "By 1920, then, a more significant and much more difficult rôle had been assigned economic regulation. It had to protect both shippers and carriers . . ."

(2) p. 203: "The underlying general objective in 1920 of promoting an adequate transportation system by regulatory action to implement carrier profits was continued in the Motor Carrier Act of 1935 and the Transportation Act of 1940 . . ."

[84] Orders Serial No. E-4431.

the sense that they do not depart so radically from such precedent as to make probable their being reversed in the courts. A possible exception may be found in the (implied) doctrine that the charging of rates which are reasonable on a certain segment may be prevented by regulatory action in order to support less profitable services elsewhere; in addition, there may be some doubt as to the legal validity of holding up rates for the purpose of protecting the traffic of competitors. Even the general approach of the Board – i.e., its single-minded pursuit of maximum profits for the carriers[85]–finds a partial analogy in the recent history of surface carrier regulation, although the specific use of categories generally associated with the protection of transport users from discrimination in this connection is somewhat of an innovation. It has been pointed out that the invocation of these categories (even as specifically interpreted by the Board) may necessitate some fast legal footwork in the future in order to prevent their assuming a life of their own contrary to the general purpose of the Board.

To say that regulatory precedent does not generally rule out rate regulation oriented toward the conservation of commercial revenues, however, is far from saying that traditional regulation has as one of its aims the maximization of carrier profits. On the contrary, total revenues sufficient to cover total costs (including capital costs) would seem to be enough to meet the "positive" or "need" requirements of the rate-making rules included in the Interstate Commerce Act as well as similar provisions incorporated in Section 1002 (e) of the Civil Aeronautics Act; and it does not seem likely that the broad policy declarations in either Act envisaged the sanction – still less the active initiation – by the regulators of only such price policies as would produce the highest possible profits.

As the Board's position in *The Hawaiian Common Fares Case* suggests, the special circumstance which may be adduced to support such

[85] It has been suggested that the Board's policy might better be described as one of ruling out rate policies which are believed to decrease net earnings rather than aiming at maximum earnings for the carriers. The suggested description may mean one of two things, namely (a) ruling out rate policies believed to decrease net earnings as compared with a certain approved level, *e.g.*, present net earnings or (b) ruling out rate policies believed to decrease net earnings as compared with the maximum possible net earnings. Interpreted in the latter manner (b) the proposed description, as compared with maximization of net earnings, embodies a distinction without a difference. The former description (a) is not an adequate description of the Board's policy if it is taken to refer to present earnings; if the "approved level" is equal to or above the maximum now possible, the description is, of course, compatible with the Board's policy, but makes no practical difference as compared with unqualified profit maximization. The Board has not merely disapproved rate policies which might decrease present net earnings; it has approved rate policies which are expected to increase net earnings, and has even attempted to initiate such policies. There may indeed be some other "approved level" which the Board regards as a reasonable maximum—*e.g.*, those earnings which would represent commercial self-sufficiency for each carrier as a whole. However, this standard has not yet become an operative maximum, and as long as commercial revenues fall short of covering total costs, the practical results of such a standard will remain the same as those arising from an unqualified aim of profit maximization.

a policy in the airline field is the "subsidized" nature of the carriers — i.e., their peculiar relationship to the public treasury whereby their commercial losses must be made up by Government contributions. As has been noted, given this relationship, it is obvious that, at least as long as commercial revenues fall at all short of covering total costs, a policy of minimizing losses before mail pay can be argued for on grounds of governmental economy. But it is also obvious, in view of the fact that mail is carried by the airlines, that at some point before total costs are covered such a policy must result in shifting to the commercial traffic costs which should be borne by the Post Office Department. It is for this reason that the conservation of government funds does not appear to be an appropriate guide for air transport rate-making.

If it is accepted that the government as buyer of air transportation is not entitled to preferential treatment — that is, that the commercial traffic should not be called upon to subsidize the carriage of the mails — then it follows that a commercial rate policy aimed at maximization of net revenue or minimization of net loss before mail pay is generally justified only where the operation in question cannot, or can only just, be supported by the commercial revenues thereby obtained plus the maximum legitimate mail payment. In this case, the commercial traffic and the mail traffic would receive equal treatment. Where the operation can be more than supported by such revenues, i.e., where the total cost of the operation to which the commercial rate is applied is less than could be borne by commercial demand plus demand for mail transportation, the problem of the proper distribution of total cost between commercial and mail traffic must be considered to arrive at an equitable rate system. It is conceivable that under certain peculiar circumstances a monopolistic rate for commercial traffic might be justified under these conditions, but in many cases such a rate policy would involve placing an undue burden on this traffic.

It has been noted that in the above-discussed cases the question of the appropriate mail rate and revenue has not been considered by the Board — and properly not, because under a general rate policy of maximizing net revenue or minimizing net loss before mail pay, the problem does not arise: to put it another way, the assumption is that the appropriate mail payment is the smallest possible. It has also been suggested, however, that a commercial rate policy aimed at conformity to cost would immediately bring up this problem. It is now submitted that the appropriateness of the former policy can itself not be determined unless it is first known whether or not the service is more than capable of being supported by total demand — including both commercial and mail. The problem of the determination of the legitimate mail payment is seen, therefore, to be a basic one in connection with the regulation of commercial rates. The second part of this study will be concerned with this problem.

EFFECTS OF COMPETITION AND CHANGES IN ROUTE STRUCTURE ON GROWTH OF DOMESTIC AIR TRAVEL

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IN appearances before the Civil Aeronautics Board, many applicants and civic bodies claimed that the addition of competitive carriers on a route caused large increases in air travel. Also, they claimed that astronomical growth of air travel followed certification and operation of one-carrier service on routes formerly served by the connecting service of two or more carriers. These claims were based on comparisons of prewar and postwar travel taken from surveys of the Civil Aeronautics Board. American Airlines questioned the validity of many such claims, since they were based upon selected statistics, that did not show average growth tendencies of the industry.

American Airlines, therefore, decided to make a study of prewar and postwar air travel using a sample that would be broad enough to show true growth tendencies. In this sample, all of the travel was classified so as to isolate the effects of added competition and institution of one-carrier service for the first time. It was found that these factors affected growth of air travel to only a small extent, far less than has generally been claimed. It was found that other factors, not so generally recognized, caused a large part of the growth of air travel that was credited to competition and substitution of one-carrier service.

In order to determine, separately, the effect on travel growth of competitive and one-carrier service, the air travel between city-pairs was classified, and average rates of growth from the prewar to the postwar period of groups with similar travel content were compared. The effect of extraneous factors, such as growth of national income, was minimized, since they affected all groups to the same extent. The travel between city-pairs was divided into five classifications.

1. City-pairs between which "first one-carrier" service was authorized in the postwar period, but which had received connecting service by two or more carriers prewar.
2. City-pairs between which "connecting-only" service was provided in both periods.
3. City-pairs between which one-carrier service was provided in the prewar period, but which received competitive service from

one or more additional carriers postwar; these were termed "competition-added."

4. City-pairs between which the same single carrier provided service in both periods; these were termed "same one carrier."
5. City-pairs between which the same two or more competing carriers provided through service in both periods; these were termed "same competitive."

In order to classify travel as competitive or one-carrier, the following rules were used:

1. An airline must have carried 20 per cent as much traffic as the leading carrier in order to be classified as a competitor. Intent was to show real competitive impacts, not potential competition.[1]

2. One-carrier service must have been used by at least 20 percent of the travel between city-pairs; otherwise the segment was classified as "connecting-only," since connecting carriers obviously provided the essential service. The 20 per cent rule was applied to prewar and postwar travel.

3. Interchange travel was considered as one-carrier travel between city-pairs where one-plane service was provided, since very little difference was found in rates of growth.[2]

4. If another carrier, because of its changed route structure, captured over 80 per cent of the travel formerly carried by a carrier with a more circuitous route, it was classified as "first one-carrier" travel.

The Sample

It was recognized that the size of the sample was important, if the survey was to be unbiased. For this reason, the survey covered *all* traffic to and from the first ten [3] traffic markets of the nation, which were New York/Newark, Chicago, Los Angeles/Long Beach, San Francisco/Oakland, Washington, Detroit, Boston, Miami, Dallas/Fort Worth and Seattle. September 1940 travel was compared with September 1948 travel for all cities except Miami, for which March 1941 and March 1949 travel was compared, for seasonal reasons.[4] This sample represented over 35 percent of the nation's domestic airline travel.

City-pairs with travel from 60 to 6000 postwar passengers per month were included, unless the prewar volume of travel was less than five per month. Inclusion of segments with more than 6000 passengers per month would have greatly distorted averages, and therefore tended

[1] See Appendix III for 17 additional segments where competition penetrated as low as 10 percent. Reclassification would have made no material difference in the results of this survey.

[2] The interchanges considered were: United-Western interchange in September 1940, and Trans World-Delta interchange in September 1948 and March 1949.

[3] Based on Passenger Miles.

[4] Data from last prewar surveys by Civil Aeronautics Board is compared with Board's last published postwar surveys. September was ordinarily the largest travel month for most U. S. cities, but for Miami, March was much larger and more comparable.

to hide the growth characteristics of the many smaller segments.[5] City-pairs with less than 5 prewar passengers were regarded as too immature to consider; nevertheless, their inclusion would have made no material change in results of this survey.[6] City-pairs less than 150 miles apart were eliminated, except four city-pairs separated by natural barriers, which were retained, since ground travel required far more than 150 miles.[7] In a few instances, travel of two adjacent cities was combined. To have considered travel from each separately would have distorted the survey, since the proximity of the airports allowed their alternate use.[8]

Comparison of Rates of Growth

1. *Effect of "First One-Carrier" Service*

In order to measure the effect on travel growth of the substitution of "first one-carrier" service for "connecting-only" service, a comparison was made of the growth experienced by the city-pairs receiving each type of service. This comparison showed that first one-carrier service stimulated the average rate of growth to only a limited extent.

Travel Classification	*Number of City-Pairs*	*Passengers*		*Average Growth Ratio—Postwar to Prewar*
		Prewar	*Postwar*	
First one-carrier	155	8,014	60,775	7.58
Connecting-only	57	1,456	9,818	6.74

Travel on 155 segments receiving one-carrier service for the first time in the postwar period was 7.58 times greater than prewar; however, travel on 57 segments receiving connecting-only service was 6.74 times greater. A comparison of the relative rates of growth showed that the first one-carrier travel grew only 12.5 percent faster than connecting-only travel.

As compared with the extravagant claims, it appeared that the stimulating power of one-carrier service was overrated, and that the development of connecting travel was greatly underrated. Many carriers were eager to provide effective connecting service, and the public patronized it well. The quality and convenience of well-coordinated, end-to-end connecting service, operated with the finest planes and with few stops was not generally appreciated by such claimants.

2. *Effect of Added Competition*

The effect of added competition on travel growth was measured by comparing average growth of segments, where competition was added in the postwar period, with that between city-pairs which continued to receive service from a single carrier in both periods. This comparison

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[5] See Appendix III-B.

[6] See Appendix III-A.

[7] City-pairs included and their railroad mileages were:

Chicago-Muskegon	193	Detroit-Akron	231
Chicago-Grand Rapids	184	Washington-Norfolk	224

[8] Buffalo-Niagara Falls, Tampa-St. Petersburg, and Hartford-Springfield.

indicated that the addition of service by competing carrier had very little effect on the rate of growth of air travel.

Travel Classification	*Number of City-Pairs*	*Passengers*		*Average Growth Ratio—Postwar to Prewar*
		Prewar	*Postwar*	
Competition added	92	26,414	118,198	4.47
Same one-carrier	267	38,871	168,880	4.34

Travel on 92 segments, where competition was added, was 4.47 times greater in the postwar period, but travel on 267 segments served by a single carrier was 4.34 times greater. The difference in average rates of growth was only 3 percent, a comparatively minor difference. This comparison, showing the small increase in growth following the certification of competing carriers, reveals that such certification merely results in the distribution of normal traffic among more carriers. As a matter of fact, on some routes, where traffic volumes were small, adding competition caused all carriers to experience difficulty in operating profitably. The Civil Aeronautics Board has recognized this problem on some routes and has initiated investigations.[9]

3. *Effect of Unchanged Competition*

The last comparison showed that travel on segments served by competitive carriers in both periods did not grow as rapidly as travel between city-pairs served by a single carrier. This statistical finding was completely contrary to claims of those who have supported the proposition that competition has acted as a tremendous and continuous spur to travel growth.

Travel Classification	*Number of City-Pairs*	*Passengers*		*Average Growth Ratio—Postwar to Prewar*
		Prewar	*Postwar*	
Same competition	18	9,079	30,382	3.35
Same one-carrier	267	38,871	168,880	4.34

Travel on 18 segments given one-carrier service by competing carriers was only 3.35 times greater in the postwar period. This growth rate was 23 percent *less* than that of travel between 267 segments served by a single carrier in both periods. Travel on these latter segments was 4.34 times greater in the postwar period.

The sample indicated that competition did not provide any *continuous* stimulating effect.

Other Factors Affecting Travel Growth

Since competition and changes in route structure had only a minor influence on domestic air travel growth, further examination of the data was made in order to determine what factors did affect growth. It was found that several other factors had considerably more effect, but that an examination of *individual* city-pairs was required if their

[9] Routes under investigation are those between Chicago and Washington (Docket No. 3660), between Twin Cities, Detroit and Washington (Docket No. 3661), and between New York and Detroit (Docket No. 3662).

growth characteristics were to be understood. The most important factors which aided or hindered growth are treated below.

1. *Volume of Travel Between City-Pairs*

Travel between city-pairs was classified by postwar intercity volume in order to determine whether a relationship existed between the size of segment and the rate of growth. The sample showed:

Postwar Travel Volume Per Month Between City-Pairs	*Number of City-Pairs*	*Postwar Travel*	*Average Growth Ratio—Postwar to Prewar*
60 to 300 passengers	316	11.8%	5.02
301 to 600 passengers	104	11.6%	5.24
601 to 1500 passengers	97	23.5%	4.82
1501 to 6000 passengers	72	53.1%	4.36
	589	100.0%	4.63

Included in the 316 city-pairs in the 60 to 300 volume group were the only four city-pairs experiencing a negative growth. Inclusion of these pairs pulled down the group average from 5.36 to 5.02 which was below that of the 301-600 volume group.[10] Taking this factor into consideration, the table indicated that there existed an inverse relationship between volume and growth. The larger the travel volume, the slower was the rate of growth.

This trend was set by the competition-added travel, the same one-carrier travel, and the same-competitive travel, which constituted 82 percent of the travel in the sample, although constituting only 64 percent of the number of city-pairs.[11]

This inverse trend can be explained. During prewar years, carriers emphasized development between larger cities. Postwar, more attention was given to travel between smaller cities and larger travel increases resulted.

This study is of further interest in that it showed the effects of competition on different volumes of travel.

Postwar Travel Volume per Month	*Competition Added City-Pairs*	*Competition Added Growth Ratio*	*Same One-Carrier City-Pairs*	*Same One-Carrier Growth Ratio*
60 to 300 passengers	27	4.11	131	4.24
301 to 600 passengers	19	4.85	54	4.87
601 to 1500 passengers	18	4.39	53	4.36
1501 to 6000 passengers	28	4.48	29	4.23

In the 60-300 and 301-600 volume groups, where the added competition was generally incidental to the other purposes of the route structure change, the segments on which competition was added showed slower growth than the segments served by a single carrier. Competition on these routes, with small volume, was especially harmful. The costs of the competing carrier were added, but no additional revenues were generated to offset them. In the 601-1500 group, where the added competition may either have been by design or incidental, the competi-

[10] See Appendix III-C.
[11] See Appendix I.

tion-added segments grew less than one percent faster. In the 1501-6000 group, where competition was often added by design in hopes of greatly stimulating travel, but almost invariably without findings of inadequacies of existing one-carrier services, the average rate of growth on segments where competition was added was only 6 percent greater than on segments without the added competition. Even on these large segments, therefore, no real increases in travel were generated as an offset against the substantially increased costs.

2. *Leveling-Off of Air Travel*

The tendency of travel to level-off is related to its stage of development in the prewar period as reflected in the volume of travel. Therefore, the tendency for growth to level-off is more pronounced on the larger segments where development is most advanced.

Leveling-off of travel on entire routes was in evidence before the war. This was shown in Civil Aeronautics Board statistics of traffic growth (passenger miles) on the various routes from September 1940 to September 1941, when average growth-ratio was 135 percent.

Leveled-Off Growth	*Very Rapid Growth*
AAL Route 7—118%	BNF Route 9—164%
EAL Route 5—121%	EAL Route 6—168%
NWA Route 3—119%	CAP Route 14—184%
TWA Route 44—122%	WAL Route 13—166%

The great variations in growth shown above resulted from differences in the stages of development in September 1940. For example, American's Route 7 and Trans-World's Route 44 grew at relatively slow rates. Both routes lay in the New York-Chicago, Northeastern region, Route 44 extending to Kansas City. In this region, the previous development of competitive and non-competitive travel was intense. All important segments enjoyed high quality prewar service, and no material mileage savings were possible. Travel volume was beginning to level-off, and therefore grew at a slower rate than it did on segments that were immature and underdeveloped during prewar periods.

3. *Reduction in Mileages*

Between many city-pairs, certification of first one-carrier service resulted in substantial reduction of air route mileage, and in most instances this was accompanied by correspondingly reduced fares. Effects on travel growth are clearly shown in segments listed below:

City-Pairs with First One-Carrier Service	*Reduction in Circuity*	*Passengers*		*Average Growth Ratio—Postwar to Prewar*
		Prewar	*Postwar*	
Miami-Cincinnati	11%	72	921	12.8
Miami-Cleveland	15%	143	1,759	12.3
Dallas/Ft. Worth-San Diego	15%	7	210	30.0
New York-Columbia, S. C.	17%	12	202	16.8
Dallas/Ft. Worth-Denver	19%	10	462	46.2
Detroit-Indianapolis	24%	67	1,234	18.4
Washington-Syracuse	29%	55	925	16.8
Total		366	5,713	15.6
Average for 155 segments receiving First One-Carrier Service				7.6

From the foregoing tabulation, it was evident that large reduction in mileage and fares stimulated the rates of growth.

Between city-pairs, where certification of first one-carrier service resulted in little or no reduction in circuity, the rate of growth was small.

City-Pairs Growth First One-Carrier Service	*Reduction in Circuity*	*Passengers Prewar*	*Postwar*	*Average Growth Ratio—Postwar to Prewar*
Boston-Pittsburgh	4%	190	1,102	5.8
New York-Portland, Me.	4%	335	1,961	5.9
Boston-Richmond	3%	29	169	5.8
New York-Birmingham	3%	186	723	3.9
Chicago-Richmond	0%	42	219	5.2
Washington-Kansas City	0%	120	572	4.8
Boston-New Orleans	0%	35	139	4.0
Total		937	4,885	5.2
Average for 155 segments receiving First One-Carrier Service				7.6

It is evident that when mileage reductions were small or nil, tendency of first one-carrier to stimulate growth was much less.

Reduction in mileage has also resulted in greatly increased growth of other types of travel.

City-Pairs	*Reduction in Circuity*	*Passengers Prewar*	*Postwar*	*Average Growth Ratio—Postwar to Prewar*
(a) Connecting-only travel				
Los Angeles-New Orleans	7.8%	32	306	9.56
Seattle-Dallas/Ft. Worth	14.2%	8	118	14.75
Chicago-Bristol	29.0%	10	135	13.50
Total		50	559	11.18
Average for 57 Connecting-only Segments				6.74
(b) Same One-Carrier Travel				
Los Angeles-Oklahoma City	15.5%	34	527	15.50
Los Angeles-Tulsa	15.3%	31	476	15.35
Washington-Tulsa	15.3%*	33	315	9.55
Total		98	1,318	13.45
Average of 267 Same One-Carrier Segments				4.34
(c) Same Competitive				
Dallas/Ft. Worth-Chicago	11.1%	421	2,093	4.97
Average of 18 Same Competitive Segments				3.35

* Prewar distance computed via Chicago via AAL.

Thus, the factor of reduced mileage encouraged growth of all types of travel, and appeared to have been much more important than type of service.

These examples all pointed to the same general trend, the greater the reduction in mileage and fares, the greater the growth, irrespective of type of service.

4. *Mileage Between City-Pairs*

Classification of city-pairs by postwar mileage ranges, indicated that mileage between city-pairs had little influence on travel over 1,000 miles as shown by the following:

Range	*Number of City-Pairs*	*Percent of Travel Sample*	*Average Growth Ratio--Postwar to Prewar*
Over 2,000 miles	48	5.0%	5.58
1601 to 2000	50	5.9%	6.66
1201 to 1600	59	5.7%	6.02
1001 to 1200	55	7.3%	6.46

This long range travel represented a little less than one-fourth of the travel sample.

In the ranges below 1,000 miles, which constituted more than three-fourths of the travel sample, the rates of growth tended to decline as the distances became less, as clearly shown below:

Range	*Number of City-Pairs*	*Percent of Travel Sample*	*Average Growth Ratio--Postwar to Prewar*
1001 to 1200 miles	55	7.3%	6.46
801 to 1000	75	9.1%	5.18
601 to 800	87	10.7%	5.25
401 to 600	95	17.9%	4.19
400 and below	120	38.5%	3.97

Below 1000 miles, competition from railroads became progressively greater, and the advantages of air transportation became less pronounced; air travel growth was correspondingly retarded.

A detailed breakdown of travel growth at different ranges by types of service is shown in Appendix II. It will be noted that above 1600 miles connecting-only traffic developed considerably more than any other type of service.

5. *Improvement of Airports*

Improved airports at several cities have increased the reliability of service and encouraged carriers to increase frequency of service and to schedule flights at better hours. Two such cities on American's system were Charleston, W. Va., and Scranton-Wilkes Barre, Pa. In both instances, new hilltop airports were developed replacing valley airports. Results showed:

City-Pairs	*Passengers Prewar*	*Passengers Postwar*	*Growth Ratio Postwar to Prewar*
(a) With Competition Added			
Boston-Charleston, W. Va.	19	121	6.4
New York-Charleston, W. Va.	93	1,105	11.9
Washington-Charleston, W. Va.	104	904	8.7
Chicago-Scranton/Wilkes Barre	14	167	11.9
Total	230	2,297	10.0
Average for 92 Segments, Competition Added			4.5

City-Pairs	*Passengers Prewar*	*Passengers Postwar*	*Growth Ratio Postwar to Prewar*
(b) With Same One-Carrier Service			
Chicago-Charleston, W. Va.	39	552	14.2
Detroit-Scranton/Wilkes Barre	8	93	11.6
Total	47	645	13.7
Average for 267 Segments, Same One-Carrier			4.3

From the foregoing, it is apparent that the improved airports at Charleston and Scranton/Wilkes Barre were far more important in stimulating travel growth than was type of service. The growth of both segments was greater than the average for its group. Furthermore, the segments receiving the same one-carrier service improved more than did those over which competition was added.

6. *Absorption of Growth for Adjacent City-Pairs*

In some instances high rates of growth resulted from diversion of growth from adjacent city-pairs. It was a common belief that all air travel increases were clear gains, but that has not been the case. There were two kinds of such diversion.

(a) Growth was diverted to segments, which received first one-carrier service, from the normal growth of other adjacent segments. This diversion resulted in some rather large rates of growth, that could not be credited entirely to the new type service.

City-Pairs Benefiting from First One-Carrier Service	*Growth Ratio Postwar to Prewar*	
New York-Milwaukee Growth	15.33	
absorbed part of New York-Chicago Growth		3.09
New York-Bangor Growth	6.20	
absorbed part of Boston-Bangor Growth		2.96
New York-Montpelier Growth	15.89	
absorbed part of Boston-Montpelier Growth		1.70

The large growth shown for the three segments, which benefited from first one-carrier service, resulted in part from diversion of growth from three other segments, whose growth was correspondingly depressed. In 1940, the New York to Chicago travel included passengers beyond to Milwaukee, connecting by railroad and interurban. Upon certification of through service, New York to Milwaukee, this traffic was diverted from the New York-Chicago segment to the New York-Milwaukee segment.[12] The large growth of travel from New York to Bangor, and New York to Montpelier, following the extension of Northeast into New York, resulted from similar diversion of passengers from Northeast's Boston-Bangor and Boston-Montpelier segments. Many passengers were shown in prewar surveys of the Civil Aeronautics Board as having originated in Boston.

(b) Certification of service to cities, which had not received service during the prewar periods, also caused diversion of normal growth segments.

City-Pairs and Character of Diversion	*Growth Ratio Postwar to Prewar*
Chicago-Buffalo Growth	3.23
partly absorbed by certification of Chicago Toronto service over Trans-Canada.	
Chicago-Cleveland Growth	2.73
partly absorbed by growth of Chicago-Youngstown segment.	

[12] See Transcript Page 79, Volume 2, in North Central Case, CAB Docket No. 415, et al.

Washington-Cleveland Growth partly absorbed by growth of Washington-Toledo segment.	3.08
New York-Akron Growth partly absorbed by growth of New York-Youngstown segment.	2.56

The relatively low rates of growth between these four city-pairs, resulted from loss of traffic generated by nearby cities, which received service for the first time, postwar. For example, prewar, the air travel moving from Chicago to Toronto moved via Buffalo and appeared on the surveys of the Civil Aeronautics Board as Chicago-Buffalo travel. Following certification of Trans-Canada Airlines between Chicago and Toronto, the postwar travel was shown as moving between these points. It was diverted from the Chicago-Buffalo segment.

Authorization of air service to other new cities caused similar diversion. For example:

Topeka has diverted from Kansas City
Terre Haute has diverted from Indianapolis and St. Louis
Lincoln has diverted from Omaha by its greatly improved postwar service
Toledo has diverted from Detroit as well as Cleveland
Peoria has diverted from Chicago

In most of these instances the proportions of diversion have been small, yet they nevertheless have been factors contributing to the slower rates of growth on certain Kansas City, Indianapolis, St. Louis, Omaha, Detroit and Chicago segments.

7. *Growth of International Travel and Shifts in International Gateways*

While this was a study of domestic travel growth in which international segments such as New York-Montreal were eliminated, nevertheless the domestic portions of international travel were shown as domestic travel to the gateway city. It was so treated in this survey, because its deletion would have been extremely difficult.

The postwar shift of the principal gateway cities has affected travel growth. As an example, the gateway city to Mexico was shifted from Brownsville to San Antonio. The domestic portion of this international travel was formerly included in the travel to and from Brownsville. Postwar it was included in the San Antonio travel. This shift increased the growth rate of "competition-added" travel at several mileage ranges, although the traffic growth is not attributable to the creation of competition.

In the 1201 to 1600 mile range, there was only one such item which showed postwar travel nearly 16 times that of prewar; the segment was Washington-San Antonio. If travel between Washington-Monterrey and Washington-Mexico City had been excluded, the growth-ratio of this segment would have been only 7.79, or about half.

In the 1601-2000 mile range, growth of competition-added travel was 7.5 times. If New York-Monterrey and New York-Mexico City had been excluded, the growth would have been 6.67 times. Similarly, in the 1001-1200 mile range, exclusion of Chicago-Mexico City and Chicago-Monterrey travel would have reduced the growth ratio from 8.05 to 7.09.

Conclusions

1. Claims for greatly increased air travel following certification of "first one-carrier" service have not been borne out by a large, unbiased statistical sample of prewar and postwar travel.

2. Claims for greatly stimulated air travel resulting from competition have not been borne out.

3. Connecting service has been nearly as effective in developing air travel as "first one-carrier" service, and has been greatly underrated.

4. No reliance at all can be placed on claims which were based on samples, biased in their selection of city-pairs.

5. Other factors have influenced growth of air travel much more than either the addition of competition or certification of "first one-carrier" service. In making comparisons, these other factors must be considered; otherwise the comparisons are distorted.

APPENDIX I

Comparative Growth of Postwar and Prewar Air Travel at Ten Leading Cities as Affected by Type of Service Classified by Volumes of Travel

Type of Service	*City-Pairs*	*Passengers Prewar*	*Passengers Postwar*	*Growth Ratio*	*Percent of Group Travel*
60-300 *Passengers*					
First one carrier	108	2,305	15,549	6.75	25.6%
Connecting only	48	986	5,527	5.61	56.3
Competition added	27	1,219	5,015	4.11	4.2
Same one carrier	131	4,585	19,428	4.24	11.5
Same competitive	2	32	290	9.06	0.9
Total	316	9,127	45,809	5.02	11.8%
301-600 *Passengers*					
First one carrier	19	1,377	8,657	6.29	14.2%
Connecting only	7	304	2,714	8.93	27.6
Competition added	19	1,791	8,693	4.85	7.4
Same one carrier	54	4,662	22,687	4.87	13.4
Same competitive	5	482	2,420	5.02	8.0
Total	104	8,616	45,171	5.24	11.6%
601-1,500 *Passengers*					
First one carrier	20	2,251	18,539	8.24	30.5%
Connecting only	2	166	1,577	9.50	16.1
Competition added	18	3,997	17,560	4.39	14.9
Same one carrier	53	11,311	49,260	4.36	29.2
Same competitive	4	1,178	4,219	3.58	13.9
Total	97	18,903	91,155	4.82	23.5%
1,501-6,000 *Passengers*					
First one carrier	8	2,081	18,030	8.66	29.7%
Connecting only	..	....	.....	...	...
Competition added	28	19,407	86,930	4.48	73.6
Same one carrier	29	18,313	77,505	4.23	45.9
Same competitive	7	7,387	23,453	3.17	77.2
Total	72	47,188	205,918	4.36	53.1%

Aggregate					
First one carrier	155	8,014	60,775	7.58	100.0%
Connection only	57	1,456	9,818	6.74	100.0%
Competition added	92	26,414	118,198	4.47	100.0%
Same one carrier	267	38,871	168,880	4.34	100.0%
Same competitive	18	9,079	30,382	3.35	100.0%
Total	589	83,834	388,053	4.63	100.0%

Source: CAB Surveys of Airline Travel for September 1940, March 1941, September 1948, and March 1949.

APPENDIX II

Comparative Growth of Postwar and Prewar Air Travel at Ten Leading Cities as Affected by Type of Service Classified by Distance Between Cities

Travel Classification	*City-Pairs*	*Passengers Prewar*	*Passengers Postwar*	*Growth Ratio*	*Percent of Travel*
1. *Over* 2,000 *miles*					
First one-carrier	20	842	5,123	6.08	
Connecting only	4	104	843	8.11	
Competition added	10	2,003	10,442	5.21	
Same one carrier	13	525	2,955	5.63	
Same competitive	1	10	81	8.10	
Total	48	3,484	19,444	5.58	5.01%
2. 1,601-2,000 *miles*					
First one-carrier	13	359	2,999	8.35	
Connecting only	10	232	2,468[1]	10.64	
Competition added	7	1,579	11,844	7.50	
Same one carrier	16	747	3,297	4.41	
Same competitive	4	499	2,128	4.26	
Total	50	3,416	22,736	6.66	5.86%
3. 1,201-1,600 *miles*					
First one-carrier	13	603	4,316	7.16	
Connecting only	16	396	2,639[1]	6.66	
Competition added	1	33	527	15.97	
Same one carrier	27	2,442	13,122	5.37	
Same competitive	2	174	1,350	7.76	
Total	59	3,648	21,954	6.02	5.66%
4. 1,001-1,200 *miles*					
First one-carrier	16	1,100	9,047	8.22	
Connecting only	6	228	1,374	6.03	
Competition added	6	493	3,970	8.05	
Same one carrier	27	2,575	13,994	5.43	
Same competitive	..	...	.....	...	
Total	55	4,396	28,385	6.46	7.31%
5. 801-1,000 *miles*					
First one-carrier	19	805	5,564	6.91	
Connecting only	10	259	1,046	4.04	
Competition added	7	1,346	6,046	4.49	
Same one carrier	38	3,465	19,108	5.51	
Same competitive	1	966	3,670	3.80	
Total	75	6,841	35,434	5.18	9.13%
6. 601-800 *miles*					
First one-carrier	30	1,059	9,296[2]	8.78	
Connecting only	4	74	344	4.65	
Competition added	16	2,496	12,653	5.07	
Same one carrier	34	3,071	13,906	4.53	
Same competitive	3	1,174	5,140	4.38	
Total	87	7,874	41,339	5.25	10.65%

7. 401-600 *miles*					
First one-carrier	22	1,587	10,106[2]	6.37	
Connecting only	6	135	979	7.25	
Competition added	19	5,856	25,727[3]	4.39	
Same one carrier	45	6,843	27,319[4]	3.99	
Same competitive	3	2,153	5,342[5]	2.48	
Total	95	16,574	69,473	4.19	17.90%
8. 400 *miles or less*					
First one-carrier	22	1,659	14,324[2]	8.63	
Connecting only	1	28	125	4.46	
Competition added	26	12,608	46,989[3]	3.73	
Same one carrier	67	19,203	75,179[4]	3.91	
Same competitive	4	4,103	12,671[5]	3.09	
Total	120	37,601	149,288	3.97	38.47%
9. *Aggregate* 1 *to* 8					
First one-carrier	155	8,014	60,775	7.58	
Connecting only	57	1,456	9,818	6.74	
Competition added	92	26,414	118,198	4.47	
Same one carrier	267	38,871	168,880	4.34	
Same competitive	18	9,079	30,382	3.35	
Total	589	83,834	388,053	4.63	100.00%

[1] 52 percent of connecting only travel in 2nd and 3rd highest ranges.
[2] 55 percent of first one-carrier travel in these three lowest ranges.
[3] 61 percent of competition added travel in two lowest ranges.
[4] 61 percent of same one-carrier travel in two lowest ranges.
[5] 59 percent of same competitive travel in two lowest ranges.

Source: CAB Surveys of Airline Travel of September 1940, March 1941, September 1948 and March 1949.

APPENDIX III

Comparative Growth of Postwar and Prewar Air Travel at Ten Leading Cities as Affected by Type of Service

Type of Service	*Pairs City*	*Prewar Passengers*	*Postwar Passengers*	*Ratio Growth*
A. *City-Pairs with Less Than* 5 *Prewar Passengers*				
60-300 *Passengers*				
First one carrier	21	35	2,434	69.54
Connecting only	14	30	1,118	37.27
Competition added	1	3	126	42.00
Same one carrier	11	30	991	33.03
Total	47	98	4,669	47.64
B. *City-Pairs with More than* 6,000 *Postwar Passengers*				
Over 6,000 *Passengers*				
Competition added	9*	41,065	156,838	3.82
Same one carrier	3	6,480	24,414	3.77
Same competitive	3	22,094	55,892	2.53
Total	15	69,639	237,144	3.41
C. *City-Pairs with Negative Growth*				
60-300 *Passengers*				
Connecting only	1	101	79	0.78
Same one carrier	3	568	415	0.73
Total	4	669	494	0.74
D. *City-Pairs* — 10 *to* 20 *Percent Competitive*				
First one carrier	1	211	681	3.23
Same one carrier	16	4,227	17,557	4.15
Total	17	4,438	18,238	4.11

* Included Detroit-Cleveland 164 miles by railroad.

Source: CAB Survey of Airline Travel for September 1940, March 1941, September 1948 and March 1949.

INTERNATIONAL

Department Editor: Joan H. Stacy*

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

11TH SESSION OF THE COUNCIL

THE fall of 1950 saw the launching by ICAO of a new program — technical assistance — whereby relatively underdeveloped States may request the Organization to furnish them with experts to lend advice and assistance in the various branches of civil aviation and obtain aviation training fellowships for their nationals to study abroad. On November 8, 1950, the ICAO Council adopted a resolution establishing a Technical Assistance Fund, in which is to be placed the money to finance the ICAO program received from the United Nations Special Account for Technical Assistance. The same resolution gave the President of the Council the authority to decide, on the basis of recommendations made by the Secretary General, which technical assistance requests are to be fulfilled by the Organization and the manner in which they are to be carried out. The President is to exercise his authority in accordance with principles laid down by the Economic and Social Council for the United Nations Expanded Technical Assistance Program[1] and by the ICAO Council from time to time.

Immediately preceding the adoption of its November 8 resolution, the Council had approved such a set of guiding principles. The Secretary General proceeded to establish an Advisory Board on technical assistance, consisting of senior officials of the Secretariat, which reviewed all requests for assistance. Requests from Indonesia and Iran for aviation assistance, which were part of comprehensive requests to the United Nations and its specialized agencies for assistance in developing the countries' economies, were given first priority. ICAO member States which had indicated their ability to supply experts to help the Organization carry out its technical assistance work were immediately asked to furnish the names of candidates for employment on ICAO projects in Indonesia and Iran. During December 1950 the ICAO External Relations Officer visited various countries in the Near and Middle East in order to work out with various requesting governments in the area arrangements for technical assistance.

The Council decided to exercise its authority under Article 54 (n) of the Chicago Convention to "consider any matter relating to the Convention which any contracting State refers to it" and answer a request from Pakistan for an interpretation of the Convention and the International Air Services Transit Agreement in relation to the right to fly over the territory of another contracting State. ICAO members States were informed that the Council on or after February 1, 1951 would proceed to formulate an advisory opinion as to whether Article 6 of the Convention requiring "special permission" for scheduled international air services to operate over or into the territory of another contracting State over-rides Article I, Section 1 of the Transit Agreement, granting the first two "freedoms of the air"[2] to scheduled international air services of contracting States.

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* Aviation Policy Staff, Department of State.

[1] Resolution 222(a) (IX) (ECOSOC) of August 15, 1949.

[2] The right to fly across another State's territory without landing and the right to land for non-traffic purposes.

In connection with the application of Article 9 of the Chicago Convention, which allows contracting States under certain conditions to restrict or prohibit aircraft of other contracting States from flying over parts of their territory, the Council approved definitions of prohibited, restricted, and danger areas, as developed by the Air Navigation Commission. At the same time the Council adopted a resolution urging contracting States to review the areas within their territory over which aircraft are restricted or prohibited from flying with a view to their elimination or reduction; also to locate such areas so as to interfere as little as possible with international air navigation. The adoption of this resolution appears to have come at an unfortunate time in world affairs.

Following adoption by the United Nations General Assembly on November 4, 1950 of a resolution revoking its recommendation of 1946 intended to debar Spain from membership in UN specialized agencies, Spain, which has been a member of ICAO since the Organization came into existence, resumed active participation by sending a delegation to the Fourth Session of the Rules of the Air and Air Traffic Control Division, held in Montreal November 14-December 13, 1950.

Legal Committee Work

Since the ICAO Legal Committee was to convene for its seventh session in Mexico City on January 2, 1951 for the purpose of attempting to prepare a final draft of the Convention on Damage Caused by Aircraft to Third Parties on the Surface, the Council took the opportunity to solicit the Committee's views on the basic principles involved in the organization of ICAO's legal work. The 1950 session of the ICAO Assembly, in Resolution A4-5, had directed the Council to "study the organization of the legal work of the Organization and the relationship of the Legal Committee to the Council and the Secretariat, and formulate proposals for any reorganization and any amendment of the constitution of the Committee which may be found necessary, and submit the proposals to an early ensuing session of the Assembly." The Council is expected to make its recommendations in time for the next session of the Assembly, which will be convened in Montreal on June 5, 1951.

After considerable discussion on the feasibility of moving the ICAO Far East and Pacific Office to a permanent location at Bangkok, Manila or Singapore, the Council decided that the office should continue to be located at Melbourne until January 1, 1952. On a broader administrative problem, that of reorganizing the ICAO headquarters Secretariat, the Council adopted substantially the recommendations of its Finance Committee affecting Administrative Bureaus. Before the Council adjourned its eleventh session on December 15, 1950, it also approved new salary scales and grades for the ICAO Secretariat, which will bring them into conformity with those recently adopted by the United Nations General Assembly. The effect of this action is to maintain the highest salaries at their previous level and to raise the salaries of the lower-grade professional and the clerical personnel.

Air Navigation Matters

During the fall of 1950 the Council approved a set of principles governing the reporting of differences from ICAO standards, practices and procedures and fourteen recommendations submitted by the Air Navigation Commission concerning the relative functions of the Council, the Air Navigation Commission, the Divisions and the Secretariat in the development of annexes to the Chicago Convention. Considerable progress was made in the further development of international standards and recommended practices in several technical fields of air navigation. Amendments Nos. 1-118 to

Annex 6 of the Chicago Convention, Standards and Recommended Practices for Operation of Aircraft, were approved by the Commission and adopted by the Council. These amendments arose from proposals by the Third Session of the ICAO Operations (OPS) Division[3] and subsequent comments by contracting States and include both revision of existing standards on scheduled operations and addition of new standards for non-scheduled operations. June 1, 1951 was established by the Council as the date for filing by contracting States of any disapprovals of the amendments, August 1, 1951 as the date for filing of differences and October 1, 1951 as the date for the amendments coming into force. At the time of adoption of the OPS amendments, the Council also approved a revision of the content and format of the standard historical material forming the introduction to the Annexes, which it had requested the Air Navigation Commission to make.

Looking toward the future, the Air Navigation Commission directed the Secretariat to request contracting States not to introduce rigid national regulations concerning turbine-powered aircraft which would hinder the development of international standards and recommended practices and to submit information for the further study of the problem.

The Commission completed its review of amendments to Annex 10, Standards and Recommended Practices for Aeronautical Telecommunications. These amendments, which consist of new material on utilization of High (HF) and Very High (VHF) Frequencies, radioteletypewriter equipment and communications procedures, codes and abbreviations, are now ready for examination and adoption by the Council. The Commission also completed its review of the draft Annex on Accident Investigation, but decided to defer submission of it to the Council pending a reexamination in the light of the Commission's recent acceptance of the United States position that Article 26 of the Chicago Convention in no way bars the development under Article 37 of standards for accident investigation. Procedures for Aeronautical Information Services (AIS), which establish basic specifications for Notices to Airmen (NOTAMS) and publications containing aeronautical information, and Instrument Approach-to-Land Procedures were approved by the Commission for submission to the Council.

Aeronautical Information Services Division

The Council approved the recommendation of the Air Navigation Commission for the establishment of a Division of Aeronautical Information Services (AIS) and tentatively approved the convening of an AIS meeting in 1952. The Commission decided that it was unnecessary to establish an ICAO Medical Division and that the medical problems of air navigation should be considered as they arise in relation to specific technical questions in recognized technical fields.

The Air Navigation Commission and the Council completed action on recommendations of the Special Airworthiness/Operations Meeting on Performance[4] which call for action by contracting States and submission of the results to the Fourth Session of the ICAO Airworthiness and Operations Divisions, scheduled to be convened in Montreal on March 20 and March 27, 1951 respectively. The Council also approved the convening of the following additional meetings of Divisions of the Air Navigation Commission during 1951:

Communications Division, Fourth Session	Montreal	April 24
Search and Rescue Division, Third Session	Montreal	September 25
Maps and Charts Division, Fifth Session	Montreal	October 30

[3] Held in Montreal, February-March, 1949.
[4] Held in Paris, September 14-October 2, 1950.

With regard to the regional work being done by ICAO on problems of air navigation, the Air Navigation Commission decided to adopt the agenda of the Third European-Mediterranean Regional Air Navigation Meeting[5] as a pattern for the agenda of any future regional meetings, subject to changes made necessary by specific requirements of a particular meeting. The Commission and the Council approved the Final Reports of the Second Middle East Regional Air Navigation Meeting[6] with the exception of the parts dealing with establishment of a Nicosia (Cyprus) Flight Information Region and Flight Information Center. During October 1950 the ICAO Far East and Pacific Office convened an informal meeting at Sydney, Australia of government and airline representatives to discuss the introduction of long-range radiotelephony for air-ground communications in the South Pacific Region. Another recent accomplishment of this regional office was the issuance of reports showing the status of implementation of air navigation facilities and services recommended by the ICAO South-East Asia Regional Air Navigation Meeting.[7]

The Council during the fall of 1950 authorized the issuance of Parts I (General) and III (Commercial Pilot License) of the draft ICAO Training Manual, which had been approved by the Air Navigation Commission. Other parts of the Manual, particularly the part dealing with air traffic controllers, are to be issued as soon as available.

Air Transport and Joint Support Matters

Assembly Resolution A4-15, on commercial rights in international air transport under Articles 5 and 6 of the Chicago Convention, had directed the Council to give priority to the question of the definition of a "scheduled international air service." The Air Transport Committee devoted considerable time during the fall of 1950 to a discussion of the elements to be included in such a definition, deciding that a scheduled international air service was one that met all the following criteria

a. Consisting of a recognizably systematic series of flights,
b. Serving two or more places or traffic areas, which considering relevant characteristics of the service, are materially the same,
c. Which is operated for remuneration of any kind,
d. Which is open to use by members of the public who from time to time seek to take advantage of it, for the transport of passengers, mail, or cargo, and
e. Which operates irrespective of payload on any individual flight within the series.

It was agreed that the definition which the Secretariat was directed to draft incorporating these elements and the accompanying commentary would have a tentative status pending a decision on the meaning and application of Article 5. The Committee also examined during its fall session the Secretariat's "Analysis of the Rights Conferred by Article 5"[8] along with the comments of contracting States thereon and directed the Secretariat to make certain changes.

The Air Transport Committee and the Council approved a communication to the Universal Postal Union on the costs of transporting international air mail in relation to principles for determining transportation charges.[9] Prior to final approval of this communication, a working group of the Air Transport Committee had been appointed to consider the comments of contracting States on the draft communication prepared last June.

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[5] Scheduled to be convened in Paris on June 26, 1951.
[6] Held in Istanbul, Turkey, October 17-November 7, 1950.
[7] Held in New Delhi, November 23-December 14, 1948.
[8] ICAO Doc. 6894, AT 694, 26/8/49.
[9] ICAO Doc. 7080, C/819, 7/12/50.

Burdensome Insurance Resolution

The Council approved the following resolution on burdensome insurance requirements:

"THE COUNCIL RESOLVES:

(1) If the laws of a Contracting State require persons engaged in international operation of aircraft into or over the territory of that State to maintain insurance against risks arising out of the conduct of such operations, those requirements should be deemed to be satisfied if the operator has effected insurance to the extent required by the State, with a financially responsible insurer domiciled in any Contracting State and entitled to insure such risks, and able to pay indemnities in the national currency of the State requiring such insurance.

(2) No Contracting State should require the submission of more than the following evidence that its requirements as to such insurance have been satisfied:

(a) A certificate from the insurer that the insurance has been effected for a stated period and that the State will be notified prior to any cancellation of the insurance;

(b) In the event of any reasonable doubt on the part of the State evidence from the insurer as to his financial responsibility and as to his ability to pay indemnities in the national currency of the State; and

(c) A certificate issued by the appropriate governmental authority exercising regulatory powers in insurance matters in the State in which the insurer is domiciled (or where the State itself has no regulatory powers in insurance matters, the highest political sub-division thereof having such powers) that he is entitled to effect such insurance.

(3) As used in this Resolution, the word "insurer" includes a group of insurers, and where a group is involved the domicile of the insurer shall be deemed to be the head under-writing office of the group."

This resolution had been approved in substantially the same form by the Air Transport Committee last year, but the United Kingdom Representative had requested postponement of Council action because his Government had desired to investigate the possibility of enlarging the scope of the resolution to include forms of security other than insurance. The United Kingdom had later concluded that such an attempt to expand the resolution was not worthwhile at this stage.

On the basis of recommendations of its Joint Support Committee, the Council approved the various contributing States' assessments for calendar year 1951 to cover the joint support of international air navigation services in Iceland, Greenland and the Faros. The Committee and the Council decided that there was not sufficient interest by States in the observation station on the Greenland Ice Cap (pioneered by Dr. Paul Victor, a Frenchman) to warrant its inclusion as a new service in the Greenland project but did approve inclusion in the project, retroactively to June 1, 1950, the weather services being provided by the Danes at Egedesminde. States contributing to the Greenland project are being solicited regarding their willingness to have included in the project at a later date the radio aids at Prins Christianssund.

The Joint Support Committee and the Council approved expansion of the Icelandic Joint Support Project so as to include maintenance and operation at Keflavik of a main meteorological office and an upper air observation program as from April 1, 1951 and July 1, 1951 respectively. Both these services were previously operated by the United States Government, but will now be turned over to Iceland for operation under the joint support arrangement. Iceland's proportionate share of the entire Icelandic project was reduced by the Council from 17½% to 12% for the calendar year 1951 on the basis that Iceland's proportionate benefits had decreased.

JOAN H. STACY

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

SIXTH ANNUAL GENERAL MEETING

THE interests of the world's airlines in present and proposed international public and private air law were exhaustively reviewed by the Sixth Annual General Meeting of IATA at San Francisco in October, 1950, by the Association's Legal Committee and its Warsaw Convention Special Committee.

Rome and Collisions Conventions

Adoption of the latest revision of the Rome Convention, which at the time of writing is before the ICAO Legal Committee at Mexico City for final action, was endorsed in principle by the IATA Legal Committee. It was considered highly desirable that the liability of the carrier to a third party be definitely established and its limitations spelled out. The Committee said that the risk which air carriers run at present without having a Convention providing liability limitation might prove to be catastrophic, considering the number of States where absolute liability without limitation is the rule for surface damage.[1]

The IATA Legal Committee also urged that provisions of any new convention on aerial collision be based on those in the Rome Convention. It opposed proposals that collision liability be put on a sliding scale according to the weight of the aircraft concerned, pointing out that under certain circumstances, the damage potential of a small aircraft might be just as great as that of larger equipment. The committee outlined six broad principles upon which it felt such a convention should be based and which will be found in the IATA Bulletin.

Interchange of Aircraft

At the request of the 1949 Annual General Meeting of IATA, the Legal Committee reported that it had found that the establishment of an international registry of aircraft, as an aid to interchange between operators, would be impracticable. Numerous important international and national regulations are based on the national registration of aircraft, the Committee said, and the establishment of an international register would involve an extensive revision of these, as well as the possible establishment of controlling agencies.

Generally, it added, no difficulties would arise if aircraft were chartered complete with crew by one operator to another; but complications would occur where national laws prevent or limit the use by an operator of a foreign registered aircraft or of crews holding foreign licenses.

The Committee foresaw no particular difficulties in the way of a limited form of interchange in which companies would exchange aircraft without crew on short notice and for short periods, under pooling agreements and where two or more companies operate the same aircraft on connecting routes, provided all national requirements for licensing, maintenance, etc., were met. If such interchange were to take place frequently, however, the Committee felt that a convention of limited scope might be possible.

Accident Investigation and Traffic Matters

Immediate access by aircraft operators and manufacturers involved to the scene of accidents was stated by the Committee to be essential. The

[1] Reports of these two bodies, which have been reprinted in full in IATA Bulletin No. 12, were accepted and approved by the General Meeting and form the basis of IATA's legal activity during the current year.

Committee pointed out that the proposed Annex to the Chicago Convention entitled "Aircraft Accident Inquiry" did not permit such access, either to the scene of the accident or to the official investigation and the evidence taken thereat, and strongly recommended that IATA continue to urge ICAO to modify its position in this regard.

The adjustment of a number of legal questions in conference with representatives of the Air Transport Association of America has made possible the coordination of domestic U.S. and international airline tickets and exchange orders, the Committee reported.

The Legal Committee also joined forces with an earlier recommendation by the IATA Financial Committee for the elimination of multiple and discriminatory taxation. It recommended that IATA and its members jointly urge government and international organizations to provide relief by domestic legislation granting exemptions unilaterally on a reciprocal basis, and by bilateral agreements.

Warsaw Convention

The Warsaw Convention Special Committee of IATA recommended that the airlines continue to oppose a revision of the Convention on the grounds that it would be premature and undesirable. They pointed out that the devaluation of currencies in many countries in September, 1949, had in effect constituted a change in the Convention, in that the actual monetary value of the maximum liability limit of 125,000 gold francs had considerably appreciated as a result.

At the same time, the IATA Committee recommended that airline studies of changes in the Convention should be continued, and laid before the meeting for comment proposed statements of position on a number of points.

Inclusion in the convention of a separate chapter of legal definitions would be undesirable and confusing, they said, since from a practical point of view, this Convention must be construed by many men who are not lawyers. Legal definitions will therefore tend to cause unnecessary trouble.

They urged that the Convention be given the widest possible geographical scope so that it would apply to any airline flight whose actual or intended destination is in a country other than the one from which it takes off. The committee said this suggestion goes further than any concrete recommendation herebefore made.

They also recommended that the Convention should apply to all carriers of persons or goods, including experimental, trial or free flights, in international traffic. At the same time, they felt that a revision would make it clear that carriers have no liability toward stowaways and recommended that liability toward company personnel be more clearly defined.

Any revision of the Convention, the report said, should take into account the possible introduction of negotiable air waybills by the airlines.

In the interest of uniformity, the committee advocated that coverage of the Convention should apply to cargo and baggage from the time it is put into the carrier's charge until it is given back to the owner or his agent, and to passengers when on incidental transport operated by the airline, such as bus from town center to airport.

Present provisions of the Convention subjecting carriers to unlimited liability where willful misconduct can be proved against them or agents should be eliminated from the Convention, the committee recommended.

The present willful misconduct clause, they said, constitutes an unfair, discriminatory and unwarranted sanction against the carrier and has invited unnecessary and expensive litigation, thereby increasing the cost to the general public of air transport. They pointed out that the basic idea of the convention is that carriers accept the burden of proof of showing that

their fault did not cause the damage in return for a real and effective limitation of liability.

They also suggested a provision that carriers are not responsible for delay or deviation of route, unless it can be proved that they were unreasonable.

The committee advocated that the presently prescribed limits of liability in terms of gold francs be retained, and urged that all parties to the lease or charter of an aircraft should be considered jointly covered and severally covered by the Convention.

If ICAO decides to proceed with the revision of the Convention, the report said, changes should be adopted in the form of a protocol covering the limited number of necessary points. To submit an entirely new substitute convention to the world's governments would lessen the present uniformity of the Convention's application, it added.

MEXICO DRAFT CONVENTION ON DAMAGE CAUSED BY FOREIGN AIRCRAFT TO THIRD PARTIES ON THE SURFACE

Editor's Note—*The seventh session of the Legal Committee of ICAO, held in Mexico City, January 2 to January 24, 1951, adopted as a final draft the following convention as a revision of the Rome Convention (the Taormina draft is printed in* 17 J. AIR L. & COM. 194 *and the draft of the Fourth Session of the ICAO Assembly is printed in* 17 J. AIR L. & COM. 328) *together with the following resolution to the ICAO Council:*

"THE LEGAL COMMITTEE CONSIDERS *that the draft of the convention on damage caused by foreign aircraft to third parties on the surface is a final draft in so far as the Committee is concerned;* DECIDES *to transmit to the Council the draft, together with a report by the Chairman and*

"RECOMMENDS TO THE COUNCIL (*a*) *that the final draft and, as soon as they are ready, the minutes of the session, be circulated to contracting States and to such other States and International Organizations as may be determined by the Council;* (*b*) *that, in circulating the draft, the Council do so with such comments as it deems appropriate and that an opportunity be afforded to States and Organizations to submit comments to ICAO within a period of four months from the date of transmission, if they consider it appropriate;* (*c*) *that any comments received be circulated immediately to States and Organizations;* (*d*) *that subject to a possible decision by the Council, based on other than legal grounds, to postpone it or take some other action, a conference or a special Assembly be convened during the month of September* 1951 *for the consideration of the draft convention with a view that the convention approved by the conference or the special Assembly be opened to signature and ratification or adherence by contracting States and such other States as the conference or the Assembly may determine;* (*e*) *that, as regards the place of a conference, as one or more invitations may be received, consideration be given to any such invitation.*"

CHAPTER I—PRINCIPLES OF LIABILITY

Article 1

(1) Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention. Nevertheless there shall be no right to compensation if the damage is due to noise or the normal flight of aircraft through the airspace, or if the damage cannot be considered as a direct consequence of the incident giving rise to the damage.

(2) For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends. In the case of an aircraft lighter than air, the expression "in flight" means the period from the moment when it is detached from the surface until it becomes attached thereto.

Article 2

(1) The liability for compensation contemplated by Article 1 of this Convention shall attach to the operator of the aircraft.

(2) (a) For the purposes of this Convention the term "operator" shall mean the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.

(b) A person shall be considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft on his behalf while performing functions for which they were employed, whether or not within the scope of their authority.

(3) The registered owner of the aircraft shall be presumed to be the operator and shall be liable as such unless, in the proceedings for the determination of his liability, he proves that some other person is the operator and procures the joinder of such other person in the proceedings if such joinder is legally possible under the law of the court having jurisdiction.

Article 3

If the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of at least 30 days, dating from the time when such right commenced, the person from whom that right was derived shall be liable jointly and severally with the operator, each of them being bound in accordance with the provisions of this Convention.

Article 4

(1) A servant or agent of an operator who makes use of an aircraft of his principal while performing functions for which he was employed, but outside the scope of his authority, shall be jointly and severally liable with the operator, each of them being bound in accordance with the provisions of this Convention.

(2) Where a person makes use of an aircraft as operator without the consent of the person entitled to its navigational control, the latter shall be liable for damage caused on the surface unless he proves that he has taken proper measures to prevent such use or that it was impossible for him to do so. In default of such proof he shall be liable jointly and severally with the unlawful user, each of them being bound in accordance with the provisions of this Convention.

Article 5

There shall be no right to compensation under the provisions of this Convention if the damage is the direct consequence of armed conflict or civil disturbance, or if a person liable under the provisions of this

Convention has been deprived of the use of the aircraft by act of public authority.

Article 6

(1) No person who would otherwise be liable under the provisions of this Convention shall be liable for damage if he proves that the damage was caused solely through the negligence or other wrongful act or omission of the person who suffers the damage. When the damage is contributed to by the person who suffers the damage, the liability shall be reduced to the extent to which the person liable proves that the damage was contributed to by the negligence or other wrongful act or omission of the person who suffers the damage.

(2) The expression "person who suffers the damage" for the purpose of this Article, shall include the servants or agents of such person, when acting within the scope of their authority, and a person whose death or injury is asserted to give rise to damage.

Article 7

When damage for which a right to compensation is granted by Article 1 has been caused by two or more aircraft, the operators of the aircraft concerned shall be liable jointly and severally to the extent to which their obligations are concurrent; and for the excess each shall be liable up to the limit applicable to his own aircraft.

Article 8

The persons referred to in paragraph (3) of Article 2, Article 3 and paragraph (1) of Article 4, shall be entitled to all defences which are available to an operator under the provisions of this Convention.

Article 9

Neither the operator, the owner, any person liable under Article 3, nor their respective servants or agents, shall be liable for damage on the surface caused by an aircraft in flight or any person or thing falling therefrom otherwise than as expressly provided in this Convention, except in the case of such a person who is guilty of an act or omission done with intent to cause damage.

Article 10

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with this Convention has a right of recourse against any other person.

CHAPTER II—EXTENT OF LIABILITY

Article 11

(1) Subject to the provisions of Articles 12 and 13, the liability for damage contemplated in Article 1, for each aircraft and incident, in respect of all persons liable under this Convention, shall not exceed:

(a) 500,000 francs for aircraft weighing 2,000 kilograms or less;

(b) 1,500,000 francs for aircraft weighing more than 2,000 kilograms, but not exceeding 6,000 kilograms;

(c) 1,500,000 francs, plus 125 francs per kilogram over 6,000 kilograms in weight of the aircraft, up to a maximum of 10,00,000 francs.

(2) The liability in respect of loss of life or personal injury shall not exceed 300,000 francs per person killed or injured.[1]

(3) "Weight" means the maximum weight of the aircraft authorized by the certificate of airworthiness for take-off, excluding the effect of lifting gas, when used.

(4) The sums mentioned in francs in this Article refer to a currency unit consisting of 65½ milligrams of gold of millesimal fineness 900. These sums may be converted into national currencies in round figures.

Article 12

(1) If the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, the liability of the operator shall be unlimited, unless such act or omission was done with the object of avoiding greater damage, or unless, in the case of an act or omission of the servants or agents concerned, the operator proves that it was done without his express authority.

(2) If a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, his liability shall be unlimited.

Article 13

(1) Whenever, under the provisions of Article 3 or of Article 4, two or more persons are jointly and severally liable for damage, or a registered owner who was not the operator is made liable as such, as provided in paragraph (3) of Article 2, the persons who suffer damage shall not be entitled to compensation greater than the highest single indemnity recoverable under Article 11.

(2) When the provisions of Article 7 are applicable, the person who suffers the damage shall be entitled to be compensated up to the aggregate of the limits applicable to each of the aircraft involved, but no operator shall be liable for a sum in excess of the limits applicable to his aircraft unless his liability is unlimited under the provisions of Article 12.

Article 14

If the total amount of the claims established exceeds the limit of liability applicable under the preceding Articles, an allocation shall be made according to the following rules, taking into account the provisions of paragraph (2) of Article 11:

(a) If the claims are exclusively in respect of loss of life or personal injury or exclusively in respect of damage to property, such claims shall be reduced in proportion to their respective amounts.

(b) If the claims are both in respect of loss of life or personal injury and in respect of damage to property, one-half of the total sum distributable shall be appropriated preferentially to meet claims in respect of loss of life or personal injury and, if insufficient, shall

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[1] The foregoing limits of liability convert to U.S. dollars at the present rate of exchange for the French gold francs specified in the Convention, and to pounds, as follows:

(a) $33,162.50 for aircraft weighing 4,409.2 pounds or less;

(b) $99,487.50 for aircraft weighing more than 4,409.2 pounds, but not exceeding 13,227.6 pounds;

(c) $99,487.50, plus $3.76 per pound over 13,227.6 pounds in weight of the aircraft, up to a maximum of $663,250.00.

(2) The liability in respect of loss of life or personal injury shall not exceed $19,897.50 per person killed or injured.

be distributed proportionally between the claims concerned. The remainder of the total sum distributable shall be distributed proportionally among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury.

CHAPTER III—SECURITY FOR OPERATOR'S LIABILITY

Article 15

(1) Any Contracting State may require that the liability of the operator of an aircraft registered in another Contracting State, in respect of damage contemplated in Article 1 sustained in its territory, shall be secured by means of insurance up to the limit applicable according to the provisions of Article 11.

(2) The insurance shall be deemed satisfactory if it conforms to the provisions of this Convention and has been effected by an insurer, or group of insurers, authorized or permitted under the laws of the State where the aircraft is registered to effect such insurance and whose financial responsibility has been verified by that State.

(3) Instead of insurance, either of the following securities authorized by the State in which the aircraft is registered shall be deemed satisfactory if the security conforms to Article 17 of this Convention:

(a) a cash deposit in a depository maintained by the State where the aircraft is registered or with a bank duly authorized or permitted to act as a depository by that State,

(b) a guarantee given by a bank authorized or permitted to do so by the State where the aircraft is registered.

(4) The State overflown may also require that the aircraft shall carry a certificate issued by the appropriate authority of the State where the aircraft is registered certifying that insurance has been effected in accordance with the provisions of paragraph (2) of this Article, or that other security has been furnished in accordance with the provisions of paragraph (3) of this Article; unless a certified copy of such certificate has been filed with the appropriate authority designated by the State overflown. The form of such certificate is set out in the Annex of this Convention.

(5) Any requirements imposed in accordance with this Article shall be notified to the Secretary General of the International Civil Aviation Organization who shall inform each Contracting State thereof.

Article 16

(1) The insured or other party providing security for the liability of the operator may set up against claims by third parties, in addition to defences available to the operator, only the following defences:

(a) that the damage occurred after the security ceased to be effective. However, if the security expires during a trip, it shall be continued in force until the next landing supervised by public authority, but no longer than twenty-four hours; and if the security ceases to be effective for any reason other than the expiration of its term, it shall be continued until the withdrawal of the certificate referred to in paragraph (4) of Article 15 becomes effective, but not beyond fifteen days after notification to the State where the aircraft is registered by the insurer or the guarantor that the security has ceased to be effective;

(b) that the damage occurred outside the territorial limits provided for by the contract of insurance or guarantee, unless flight outside of of such limits was caused by force majeure, assistance justified by the circumstances, or an error in piloting, operation or navigation.

(2) Without prejudice to any right of direct action which he may have under the law governing the contract of insurance or guarantee, the person suffering damage may bring a direct action against the insurer or guarantor in cases where the liability of the latter is extended, under the provisions of paragraph (1) of this Article, for the benefit of the person suffering damage. He shall also have a right of direct action against the insurer or guarantor in case of the operator's bankruptcy.

(3) The provisions of this Article shall not prejudice the question whether the insurer or guarantor has a right of recourse against any other person.

Article 17

(1) If security in a form other than insurance is furnished it shall be specifically and preferentially assigned to payment of claims under the provisions of this Convention.

(2) The Security shall be deemed sufficient if, in the case of an operator of one aircraft, it is in an amount equal to the limit applicable according to the provisions of Article 11, and in the case of an operator of several aircraft, if it is for an amount not less than the aggregate of the limits of liability applicable to the two aircraft subject to the highest limits.

(3) As soon as notice of a claim has been given to the operator, the amount of the security shall be increased to a total sum equivalent to (a) the amount of the security then required by paragraph (2) and (b) the amount of the claim not exceeding the limit of liability applicable to the aircraft causing the damage. This increased security shall be maintained until the claim has been disposed of.

Article 18

The claim of an operator against an insurer or guarantor shall be exempt from seizure and execution by creditors until claims of third parties under this Convention have been satisfied.

CHAPTER IV—RULES OF PROCEDURE AND LIMITATION OF ACTIONS

Article 19

If a claim for compensation is not made against the operator within twelve months from the date of the incident which caused the damage, the claimant shall only be entitled to compensation out of the amount for which the operator remains liable after all claims made within that period have been met in full, subject to the limits provided by paragraph (2) of Article 11.

Article 20

(1) Actions against any person from whom payment of compensation may be claimed under the provisions of this Convention may be brought only before the courts of the place where the damage occurred. However, upon agreement between all persons who have made claims for compensation within the period contemplated by Article 19 and the persons from whom payment of compensation may be claimed under the provisions of this Convention all actions in respect of such claims may be brought before the courts of any Contracting State.

(2) Each Contracting State shall take all necessary measures to ensure that the defendant and all other parties interested are notified of any proceedings concerning them and have a fair and adequate opportunity to defend their interests.

(3) Each Contracting State shall so far as possible ensure that all actions arising from a single incident and brought in accordance with paragraph (1) of this Article are consolidated for disposal in a single proceeding before the same court.

(4) Where any final judgment is pronounced by a competent court in conformity with this Convention, whether in the presence of the parties or in default of appearance, on which execution can be issued according to the procedural law of that court, the judgment shall be enforceable, upon compliance with the formalities prescribed by the laws of the Contracting State where execution is applied for,

(a) in the Contracting State where the judgment debtor has his residence or principal place of business or,

(b) if the assets available in that State and in the State where the judgment was pronounced are insufficient to satisfy the judgment, in any other Contracting State where the judgment debtor has assets.

(5) The merits of the case may not be reopened in proceedings under paragraph (4) of this Article.

(6) The provisions of paragraph (4) of this Article shall not be deemed to require the issue of execution if the court applied to for execution is satisfied that:

(a) the judgment was given by default and that the defendant did not acquire knowledge of the proceedings in sufficient time to act upon it;

(b) the defendant was not given a fair and adequate opportunity to defend his interests;

(c) the judgment is in respect of a cause of action which has already, as between the same parties, formed the subject of another judgment which is recognized under the law of that court is final and conclusive;

(d) the judgment has been obtained by fraud of any of the parties;

(e) the right to enforce the judgment is not vested in the person by whom the application for execution is made;

(f) the judgment is one which is contrary to the public policy of the State in which that court is located.

(7) If, in proceedings brought according to paragraph (4) of this Article, execution of any judgment is refused on any of the grounds referred to in sub-paragraphs (a), (b), (d), or (f) of paragraph (6) of this Article, the claimant shall be entitled to bring, before the courts of the State where execution has been refused, a new action for compensation not exceeding the amount adjudicated to him in the previous judgment. In such new action the previous judgment shall be in a defence only to the extent to which it has been satisfied. The previous judgment shall cease to be enforceable as soon as the new action has been started.

The right to bring a new action under this paragraph shall, notwithstanding the provisions of Article 21, be subject to a period of limitation of one year from the date on which the claimant has received notification of the refusal to execute the judgment.

(8) Notwithstanding paragraph (4) of this Article, the court applied to may refuse execution until final judgment has been given on all claims

filed within the one year period referred to in Article 19 if it is evident that judgments exceeding in aggregate the limits of liability prescribed in this Convention might be entered, and shall not be obliged to execute judgments exceeding in aggregate the relevant limit until they have been reduced in accordance with Article 14 by the courts of the State where the actions were brought.

(9) Where a judgment is rendered enforceable under this Article, payment of costs recoverable under the judgment shall also be enforceable. Nevertheless the court applied to for execution may, on the application of the judgment debtor, limit the amount of the costs to a sum equal to ten per cent of the amount for which the judgment is rendered enforceable.

(10) Interest not exceeding four per cent per annum may be allowed on the judgment debt.

(11) A judgment to which this Article applies shall only be enforceable within five years from the date on which it became final.

Article 21

(1) Actions for compensation under this Convention shall be subject to a period of limitation of two years from the date of the incident which caused the damage.

(2) The grounds for suspension or interruption of the period referred to in paragraph (1) shall be determined by the law of the court trying the action; but in any case the right of action shall be extinguished on the expiration of three years from the date of the incident which caused the damage.

CHAPTER V—APPLICATION OF THE CONVENTION AND GENERAL PROVISIONS

Article 22

(1) This Convention applies to damage contemplated in Article 1 caused in the territory of a Contracting State by an aircraft registered in another Contracting State.

(2) For the purpose of this Convention a ship or aircraft on the high seas shall be regarded as part of the territory of the State in which it is registered.

Article 23

This Convention does not apply to damage caused to an aircraft in flight, or to persons or goods on board such aircraft.

Article 24

This Convention shall not apply to damage on the surface if liability for such damage is regulated either by a contract of carriage between the person who suffers such damage and the operator or the person entitled to use the aircraft at the time the damage occurred, or by a contract of employment between such persons.

Article 25

This Convention does not apply to damage caused by military, customs or police aircraft.

Article 26

Contracting States will, as far as possible, facilitate payment of compensation under the provisions of this Convention in the currency of the State where the damage occurred.

Article 27

For the purposes of this Convention:

"Territory of a State" means the metropolitan territory of a State and all territories for the foreign relations of which that State is responsible, subject to the provisions of Article 35.

"Person" means any natural or legal person, including a State.

"Contracting State" means any State which has ratified or adhered to this Convention and whose denunciaion thereof has not become effective.

"Normal flight" means flight which, having regard to the prevailing conditions is in conformity with existing air traffic regulations.

Article 28

If legislative measure are necessary in any Contracting State to give effect to this Convention, the Secretary General of the International Civil Aviation Arganization shall be informed forthwith of the measures so taken.

Article 29

As between Contracting States which are also parties to the International Convention for the Unification of Certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface opened for signature at Rome on the 29 May 1933, the present Convention supersedes the said Convention of Rome.

CHAPTER VI—FINAL PROVISIONS

Article 30

This Convention shall remain open for signature until it comes into force in accordance with the provisions of Article 31.

Article 31

(1) This Convention shall be subject to ratification by the signatory States.

(2) The instruments of ratification shall be deposited in the archives of the International Civil Aviation Organization, which shall give notice of the date of deposit to each of the signatory and adhering States.

Article 32

(1) As soon as ———— of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the ———— instrument of ratification. It shall come into force, for each State which deposits its instrument of ratification after that date, on the ninetieth day after the deposit of its instrument of ratification.

(2) The International Civil Aviation Organization shall give notice to each signatory State of the date on which this Convention comes into force.

(3) As soon as this Convention comes into force, it shall be registered with the United Nations by the Secretary General of the International Civil Aviation Organization.

Article 33

(1) This Convention shall, after it has come into force, be open for adherence by non-signatory States.

(2) Adherence shall be effected by the deposit of an instrument of adherence in the archives of the International Civil Aviation Organization, which shall give notice of the date of the deposit to each signatory and adhering State.

(3) Adherence shall take effect as from the ninetieth day after the date of the deposit of the instrument of adherence in the archives of the International Civil Aviation Organization.

Article 34

(1) Any Contracting State may denounce this Convention by notification of denunciation to the International Civil Aviation Organization, which shall give notice of the date of receipt of such notification to each signatory and adhering State.

(2) Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

Article 35

(1) Any State may at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Convention does not apply to any one or more of the territories for the foreign relations of which such State is responsible.

(2) The International Civil Aviation Organization shall give notice of any such declaration to each signatory and adhering State.

(3) With the exception of territories in respect of which a declaration has been made in accordance with paragraph (1) of this Article, this Convention shall apply to all territories for the foreign relations of which a Contracting State is responsible.

(4) Any Contracting State may adhere to this Convention separately on behalf of all or any of the territories regarding which it has made a declaration in accordance with paragraph (1) of this Article and the provisions of paragraphs (2) and (3) of Article 32 shall apply to such adherence.

(5) Any Contracting State may denounce this Convention, in accordance with the provisions of Article 33, separately for all or any of the territories for the foreign relations of which such State is responsible.

Article 36

(1) When the whole or part of the territory, to which this Convention applies, of a Contracting State is transferred to a non-Contracting State, or when part of such territory becomes an independent State responsible for its own foreign relations, this Convention shall cease to apply to the territory so transferred or becoming an independent State as from the date of the transfer or achievement of independence.

(2) When the whole or part of the territory, to which this Convention applies, of a Contracting State is transferred to another Contracting State, this Convention shall, as from the date of such transfer, apply to the territory so transferred as part of the territory of the Contracting State to which it has been transferred.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at.....on the.....

day of the month of.....of the year.....in the English, French and Spanish languages, each text being of equal authenticity.

This Convention shall be deposited in the archives of the International Civil Aviation Organization where, in accordance with Article 29, it shall remain open for signature.

ANNEX TO THE CONVENTION

Certificate of Insurance, Guarantee or Deposit

It is hereby certified that the aircraft with Registered Number.....

has been duly insured for the period from.....to

.....for flights over the following territories.....

.....

against the risks of liability of the operator contemplated by the Convention

of .....

in accordance with the provisions of, and up to the limit specified in, the said Convention as appropriate to the said aircraft, with an insurer or group of insurers authorized or permitted by the State of Registry of the said aircraft, and whose financial responsibility has been verified by that State; or that, for the same period, and in respect of the same territories, such risks of liability have been properly secured by guarantee or deposit, as alternatively required by the said Convention and authorized or permitted by the State of Registry of the said aircraft.

Signed.....
An authorized official on behalf of

.....
(State of Registry of the Aircraft)

Date.....

Place.....

FEDERAL

CIVIL AVIATION LEGISLATION ENACTED BY THE EIGHTY-FIRST CONGRESS

First Session

P. L. 227 *Airports*—To fix the United States share of project costs, under the Federal Airport Act, involved in installation of high intensity lighting on CAA designated instrument landing runways. (S. 1278)

P. L. 187 *Airports*—To amend the Federal Airport Act so as to provide that minimum rates of wages need be specified only in contracts in excess of $2,000. (S. 1279)

P. L. 183 *Airports*—To amend the Federal Airport Act so as to limit to ten per centum any increase of the amount stated as a maximum obligation under a grant agreement. (S. 1280)

P. L. 382 *Airports*—To reapportion all unexpended funds apportioned for a State, or any portion thereof. The discretionary fund of the Civil Aeronautics Administrator is increased from 25% to 40%. (S. 1284)

P. L. 224 *Airports*—To authorize progressive partial payments to sponsors from time to time as work progresses on airport construction up to 90% of the Government's share of estimated total project costs. (S. 1285)

P. L. 298 *Airports*—To authorize the development and improvement of Logan International Airport at Boston, Mass. to be included in the 1950 construction program. (H.J. Res. 338)

P. C. 311 *Surplus Property at Airports*—To authorize the Administrator to amend deeds to permit municipalities wide latitude in use of surplus structures at airports. Also to sell property at airports not usable for airport purposes. (H.R. 3851)

P. L. 277 *Air Star Routes*—Authorizes the Postmaster General to award contracts for transportation of mail by aircraft upon star routes. (H.R. 4498)

P. L. 186 *Transportation of Explosives*—Amend the Civil Aeronautics Act to regulate transportation by air of explosives and other dangerous articles. (S. 447)

P. L. 167 *NACA*—Authorizes the creation of 10 professional and scientific positions in the headquarters and research stations of the National Advisory Committee for Aeronautics. (H.R. 20)

P. L. 60 *Guided Missiles*—To authorize the establishment of a joint long range proving ground for guided missiles. (H.R. 1741)

P. L. 378 *Customs Charges*—Authorizes a raise in the exemption on customs charges of $100. (H.R. 5268)

P. L. 35 *Tax on Transportation of Persons*—To maintain the status quo with respect to the exemption, from tax on transportation of persons, of foreign travel via Newfoundland. (H. J. Res. 203)

P. L. 393 *Wage-Hour*—To raise the minimum wage under the Fair Labor Standards Act from 40¢ to 75¢ per hour, and exempting employees of air carriers who are covered by the Railway Labor Act from the wage-hour provisions. (H.R. 5856)

Second Session

P. L. 762 *Airports—Washington*—To authorize an appropriation of $14 million for the Civil Aeronautics Administration to construct and operate a second national airport at Washington, D. C. (S. 456)

P. L. 445 *Airports*—To authorize grants under the Federal Airport Act for minor projects at major airports. (S. 1282)

P. L. 463 *Airports*—To authorize the Secretary of the Interior to acquire, construct, operate, and maintain public airports in certain areas. (S. 1283)

P. L. 846 *Airports*—To extend for a period of 5 years the time for appropriating and expending funds to carry out the Federal Airport Act. (June 30, 1958 instead of June 30, 1953) (S. 2875)

P. L. 670 *CAA Personnel*—To authorize the Civil Aeronautics Administration to detail its employees to technical schools for advanced specialized training. (S. 4)

P. L. 858 *Administrator Delegate Authority*—Authorizes the Administrator of Civil Aeronautics to delegate to private persons certain duties and authority. (S. 450)

P. L. 635 *False Marking of Aircraft*—To provide penalties for false marking of aircraft or use of fraudulent air certificates. (S. 3377)

P. L. 778 *Air Security*—To authorize the Secretary of Commerce to set up regulations governing the use of air space, classify air traffic, and otherwise provide identification machinery. (S. 3395)

P. L. 735 *Overtime*—To authorize the Secretary of Agriculture to furnish, upon a reimbursable basis, certain inspection services involving overtime work. (S. 3698)

P. L. 867 *Prototype Aircraft Development*—To authorize $12,500,000 for a 5-year program for testing and modifying of types of transport aircraft by the Civil Aeronautics Administration. (S. 3504)

P. L. 664 *Quarantine*—To authorize the Dept. of Agriculture to follow practices under the Air Commerce Act to provide for animal and plant quarantine law applicable to air navigation. (S. 442)

P. L. 734 *Social Security*—Among other things, this Act extends coverage to U.S. citizens employed outside the U.S. by an American employer, and also to foreign individuals employed as members of flight crews on American aircraft on flights which touch the United States. (H.R. 6000)

P. L. 814 *Revenue Act of* 1950 . . . *Section* 607—To render subject to transportation tax amounts paid outside the U.S. for transportation of persons which begins and ends in the U.S., or for the transportation of property from one point in the U.S. to another . . . *Section* 609—To remove the discrimination presently existing against aircraft as compared with surface ships, in the application of the manufacturers' excise taxes. (See ATA Memo. No. 65—H. R. 8920)

P. L. 774 *Defense Production Act of* 1950—To establish a system of priorities and allocations for materials and facilities . . ., provide for price and wage stabilization . . . necessary for the national security. (H.R. 9176)

P. L. 831 *Internal Security Law (McCarran Act)*—To protect the internal security of the United States by deporting subversive aliens. *Note*: The Immigration Act of 1917 carries an amendment which imposes heavy penalty on a carrier regarding the deportation of subversive aliens. If such aliens are deported within 5 years of their arrival in this country, the carrier which brought them must take them back to their homes free of charge, even though the alien held a valid visa issued by a U.S. consul abroad. *Note*: The Air Transport Association endeavored to amend the bill to provide that no fine incident to such deportation should be assessed against the owners of transportation lines bringing into or deporting from the U.S., any alien, if, at the time of foreign embarkation such alien held an unexpired visa issued by a U.S. consul. This amendment, although adopted by the Senate, was rejected in the conference report. (H.R. 9490) Passed over Presidential veto.

P. L. 909 *Excess Profits Tax Act of* 1950—To provide revenue by imposing a corporate excess profits tax commencing July 1, 1950 and terminating June 30, 1953.—Among other things, this Act contains a section (Sec. 454) exempting airlines from the tax if, after excluding mail compensation from their income, and taking the excess profits tax credit provided in the Act, there remains no income subject to the tax. (H.R. 9827) (See ATA Memo. No. 1, dated Jan. 2, 1951)

P. L. 912 *Airports*—To amend the Federal Airport Act so as to make the United States share of costs for land acquisition the same as for other project costs. (S. 1281)

P. L. 914 *Railway Labor Act Deduction From Wages*—To amend the Railway Labor Act and to authorize agreements providing for union membership and agreements for deductions from the wages of carriers' employees for certain purposes and under certain conditions. (S. 3295)

STATE AND LOCAL

CIVIL AVIATION MOBILIZATION

By MERRILL ARMOUR *

THE resources of the 100,000 or more active civilian pilots and the 60,000 odd civilian aircraft—the flying public—are affected by the action taken by the aviation industry and the Government to marshall the non-airline aviation resources on a voluntary basis for civilian defense purposes.

In July, 1950 aviation leaders became aware of the immediate need for a program and a plan of action if the civil aviation resources of the country were to be ready and able to do their full share for national defense. The problem was discussed by various segments of the industry in July and representatives thereof met as the Emergency Aviation Council in August 1950 and formulated a mobilization plan of action.

The plan was designed to prepare for the worst possible situation—an attack on the continental United States. If civil aviation could be made ready for this situation it would then be prepared for any lesser emergencies. For enemy bombed areas, it was pointed out, the functions of civil aviation should include:

1. *Bringing medical and other urgent personnel and supplies.*
2. *Evacuation.*
3. *Patrol.*
4. *Traffic control.*
5. *Communications.*

To be ready to discharge its function in the event of such an attack the mobilization plan pointed out that substantial operations of civil aircraft must be maintained or the personnel and facilities would not be available at the time of greatest need. Some of the non-airline activities which should be continued and which would serve the country production-wise were enumerated.

The emergency plan proposed the control of airports, aircraft, personnel and flight operations, for two primary objectives. One,—control to secure the utilization of the facilities in our defense program and, two—control for security purposes.

The plan proposed that airmen should be properly identified by a card with their picture, description and fingerprints. It was contemplated that this would permit a screening which would give an opportunity for adequate security check and provide a reliable force of both airmen and ground personnel for emergency situations.

The plan provided that substantial control and security would be effected by a comprehensive organization of airports with a division of these into control airports and non-control airports. A control airport would be responsible for all of the non-control airports assigned to it and complete cooperation between the control and non-control airports would be required. Aircraft and airmen would be registered either directly at their nearest control airport or at their nearest non-control airport which, in turn, would supply the parent airport with these records.

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* Washington Counsel and Assistant General Manager of Aircraft Owners and Pilots Association.

In the registering of the aircraft and airmen, information would be required to show the service which the aircraft and the airmen would be capable of rendering and also the type of service they wished to render. There would be available at each control airport information necessary for the immediate utilization of the aviation facilities in that area. The plan made it clear that these control airports would have to be integrated into a national plan to assure complete utilization of all civil aviation facilities and the concentration of these at whatever point they might be most useful or needed.

It was recognized by the Emergency Aviation Council that all of the planning, organization and records proposed by the plan would not be enough. If any organization is to operate smoothly in an emergency it must function to some extent prior to the emergency and must, in a word, try out its own programs from time to time to see that it can actually operate as planned.

While the ultimate goal was to provide the nation with the full capacity of non-scheduled civil aviation for defense emergencies, it was the belief of the industry that to achieve that goal it was essential to have the program provide for the maximum use of civil aviation consistent with the country's defense economy and defense program, believing that there might be a considerable period of semi-emergency status and hoping that the ultimate emergency for which we should be constantly prepared might not occur.

As part of its general program of action for the appropriate federal and state government agencies, the following steps were proposed. These are not given in the order of priority as no such order is deemed possible but merely for the purpose of summarizing the steps that should be taken.

1. Complete surveys, national and state, as to available civil air resources.
2. Decide on the identification needed by airmen, ground crews, and aviation radio operators (such as old AGO card) bearing picture, signature, and thumb prints. Devise a special identification to issue to those who now lack such cards.
3. Plan for supply of aircraft parts and critical materials.
4. Form state aviation councils to advise on plans (also aviation councils in the larger cities) where such groups do not exist.
5. Select control airports tentatively.
6. Issue unclassified, tentative security rules and forms for study and comment.
7. Conduct simulated operations to pre-test proposed security rules.
8. Encourage training and practice by all aviation personnel, such as navigation, meteorology, cross-country flying, and simulated disaster and search missions.
9. Encourage physical check-ups so pilot licenses will remain valid.
10. Arrange police authority for appropriate personnel, if later necessary, to carry arms and make arrests.
11. Encourage operators to buy fuel, parts and other items not now in short supply.
12. Circulate initial plans and gather information as to activities across the country to stimulate and guide volunteer effort in advance of a formalized program.
13. Fix rates for aircraft rental on government missions to cover operation, maintenance, depreciation and insurance.
14. Encourage publicity of a constructive nature to create new interest in the role of local airports and civil aircraft for public welfare.

Development of State Aviation Mobilization Plan

As time went on it became clear that the government was going to be lagging too far behind in implementing and developing the mobilization program which had been suggested by the Emergency Aviation Council. Some of the individual States commenced formulating State organizations to carry out the general program. It seemed obvious that there was a need for uniformity in the State plans and organizations in order to insure satisfactory results on a national basis. Industry, through the Emergency Aviation Council, again developed a uniform State plan. This State plan was published on December 12, 1950.[1] It was designed to fit in with the general plan for civil defense which has been suggested by National Security Resources Board. The NSRB contemplated that each State would have a civil defense director directly responsible to the Governor. It seemed proper then that civil aviation should be directly under the director of civil defense and the State plan was designed with this in mind. The State plan, it should be emphasized, follows the original program for making the control airport the basic unit in the whole civil aviation defense plan.

In setting up the aviation mobilization programs, it was realized that it might have to operate while the nation was in one of three general stages of building military strength. The first was the one then existing, a national emergency was anticipated but had not been declared by the President; the second would be that following such a declaration by the President; and the third would be when we were in a full scale war as a result of a declaration of war or an enemy attack.

Almost before the work of the Emergency Aviation Council or the Uniform State Plan was completed and distributed, the President of the United States declared a national emergency and the second condition was in effect even before the "shake-down" tests recommended during the first condition had been performed. This in itself established the accuracy of industry's conclusion that the federal government was going to be too slow.

The Emergency Aviation Council

At this point a word about the Emergency Aviation Council itself. The EAC was in one sense a child of the National Conference of Aviation Organizations. It is an informal organization without constitution, by-laws or officers. By common consent it has so far confined itself to organizations of national character. Its actual work and policies have been carried on by persons whose livelihood depends upon aviation. We generally think of such a group as distinct from government. The Council actually is separate and distinct from any federal agencies but oddly enough it has as one member the National Association of State Aviation Officials.

At the time the State plan was developed and published the following thirteen national organizations participated:

American Association of Airport Executives
Aviation Distributors & Manufacturers Association
Aircraft Industries Association of America, Inc.
Airport Operators Council
Aircraft Owners and Pilots Association
Aeronautical Training Society
Air Transport Association of America
Corporation Aircraft Owners Association, Inc.
National Aeronautic Association
The National Air Council
National Association of State Aviation Officials
National Aviation Trades Association, Inc.
National Flying Farmers Association

[1] Copies of the full plan, "State Plan for Civil Aviation in Civil Defense," may be obtained from AOPA, Washington, D. C.

JUDICIAL AND REGULATORY DECISIONS

JURISDICTION OVER CRIMES COMMITTED IN AIRCRAFT WHILE FLYING OVER THE HIGH SEAS

Department Editor: Allen H. Meyer*

THE novel case of *United States v. Cordova*[1] has for the first time brought an American court to face a problem which has long been anticipated — that of finding jurisdiction for crimes committed in aircraft while flying over the high seas.

The *Cordova* case involved a prosecution for assault and battery committed when the defendant bit the pilot as the latter was trying to break up a fight between two passengers. The plane was then flying over the Atlantic Ocean between Puerto Rico and New York. The district court found that an assault and battery had been committed, but arrested judgment of conviction as no federal jurisdiction to punish the acts could be found. The court found that assault and battery are only punishable by a United States court when committed within the admiralty and maritime jurisdiction of the United States.[2] The Act defining the admiralty and maritime jurisdiction[3] confined itself to crimes "committed *upon the high seas*, or *on any other waters* within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State *on board any vessel* belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof." (Italics added.) The court decided that prior decisions[4] and legislative action[5] had determined that an airplane was not a vessel, and held that "upon the high seas" could not be extended to mean "over the high seas."

When it is realized that this jurisdictional problem has been foreseen by various commentators since 1902,[6] the result of the *Cordova* case is somewhat surprising. But in the United States, apparently nothing has been done in anticipation of such criminal acts. Our state courts are bound by

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* Student Editor, Legal Publications Board, Northwestern University School of Law.

[1] 89 F. Supp. 298 (E. D. N. Y. 1950), 1950 USAvR 1. Not appealed.

[2] 18 U.S.C. §455 (1946), now 18 U.S.C. §§ 113(d), 113(e) (Supp. 1949). There is no problem of venue if there is jurisdiction. 18 U.S.C. §3238 (Supp. 1949) states that the place of trial shall be in the district where the accused is found or first brought.

[3] 18 U.S.C. §451 (1946), now 18 U.S.C. §7 (Supp. 1949).

[4] *United States v. Northwest Air Service, Inc.*, 80 F. 2d 804 (9th Cir. 1935); *United States v. Peoples*, 50 F. Supp. 462 (N. D. Cal. 1943); *The Crawford Bros. No. 2*, 215 Fed. 269 (W. D. Wash. 1914). *Contra*: *Reinhardt v. Newport Flying Service Corp.*, 232 N. Y. 115, 133 N. E. 371 (1921).

[5] 44 STAT. 572 (1926), 49 U.S.C. §177(a) (1946).

[6] In that year Paul Fauchille drafted his original code of air law, in which he said that crimes committed aboard aerostats wherever they may be are within the competence of the tribunals of the nation to which the aerostat belongs. *Art.* 15, *Annuaire de l'Institut de Droit International* (1902). HAROLD BROWN, AIRCRAFT AND THE LAW 190 (1933); SPAIGHT, AIRCRAFT IN PEACE AND THE LAW 124 (1919); Myers, *The Criminal in the Air*, 4 J. CRIM. L. & CRIMINOLOGY 815 (1914); Vold, *Postwar Aviation and Crime*, 35 J. CRIM. L. & CRIMINOLOGY 297 (1945).

the traditional territorial concept of jurisdiction,[7] which excludes jurisdiction for crimes committed over the high seas unless they in some way affect the state.[8] While the states have, in many instances, created the fiction of defining a crime in such a way as to make it a "continuing" offense, and thereby pulling it within the bounds of the state,[9] such legal manipulation cannot be effective in cases of assault or of murder (where both the fatal blow and the death occur above the high seas), as the entire crime has there been completed without the territory of the state.

As there is no general jurisdiction in the federal courts over common law crimes, a federal court must look to a specific federal statute defining an act as criminal and making such act punishable.[10] In the United States Criminal Code, Congress has provided that certain crimes are punishable when committed "within the Special Maritime and territorial jurisdiction of the United States," as defined in 18 U.S.C. §7.[11] That jurisdiction applies to offenses committed *on the high seas* or *on an American vessel.*

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[7] *State v. Parrish*, 242 Ala. 7, 5 So. 2d 828 (1941); *State v. Stephens*, 118 Me. 237, 107 Atl. 296 (1919); *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894). See also Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931), and Levitt, *Jurisdiction over Crimes*, 16 J. CRIM. L. & CRIMINOLOGY 316 (1925) at p. 331.

[8] *Skiriotes v. Florida*, 313 U.S. 69 (1941) (State statute forbidding use of diving equipment for taking commercial sponges from Gulf of Mexico held valid and applicable to defendant, a citizen of Florida, who violated it two marine leagues from shore); *Mortensen v. State*, 214 Ark. 528, 217 S. W. 2d 325 (1949) (false pretenses); *State ex rel. Geldar v. Kress*, — Md. —, 62 A. 2d 568 (1948) (conspiracy to violate prohibition laws of North Carolina. Purchased liquor in Maryland and obtained its transportation to North Carolina. Venue of crime in North Carolina held proper); *Lemore v. Comm.*, 127 Ky. 480, 105 S. W. 930 (1907) (defendant took prospective purchaser of liquor on boat, crossed Mississippi River from dry Kentucky to wet Missouri, made sale, and returned to Kentucky. Held that transaction made on Kentucky shore); *People v. Adams*, 3 Denio 190 (N. Y. 1846), *aff'd* 1 N. Y. 173 (1848) (false pretenses). See also N. Y. PENAL LAW §1930(5) and §1933 (1944). *The Lotus*, 2 L. of N. Permanent Court, p. 20, 1928 A.M.C. 1, showed that Turkey undertakes to punish an alien who injures a Turk outside Turkey, if the alien is so imprudent as later to come into Turkish Territory; upheld by a divided court, 7-6.

An interesting law in the TEXAS CODE OF CRIMINAL PROCEDURE, Art. 186 (1925) reads: "*Offenses not committed in the State*: Prosecutions for offenses committed wholly or in part without, and made punishable by law within this State, may be begun and carried on in any county in which the offender is found." This statute most likely would only be constitutionally applicable to crimes which in some way affect persons or property within the state. A borderline case for its application would be one in which a Texas citizen was the victim of a murder while a passenger on a trans-oceanic flight, and the murderer was subsequently apprehended in Texas.

[9] This is done most often in larceny statutes where it is provided that every transportation is a new taking and therefore the offender is punishable in every county through which the goods are brought. Many courts interpret the statute to be applicable even where the original taking was outside the state. *Schultz v. Lainson*, 234 Iowa 606, 13 N. W. 2d 326 (1944); *Garcia v. State*, 151 Tex. Crim. Rep. 272, 207 S. W. 2d 624 (1948).

Similarly, conspiracy indictments will lie in any state in which an overt act in furtherance of the conspiracy is committed. *Brown v. Elliott*, 225 U.S. 392 (1912); *People v. Murray*, 95 N. Y. S. 107 (Sup. Ct., N. Y. Cty. 1905).

And in homicide cases, the offender has been punished in the state where the victim died, even if the fatal blow was inflicted on the high seas. *Commonwealth v. Macloon*, 101 Mass. 1 (1869); *Tyler v. People*, 8 Mich. 320 (1860).

Thus, in many instances, a "continuing" crime committed on board an airplane in oceanic flight may be punishable by a state court, depending upon the wording and interpretation of the statute.

[10] *United States v. Hudson*, 7 Cranch 32 (U.S. 1812).

[11] "The term 'special maritime and territorial jurisdiction of the United States,' as used in this title (the value of the word 'special' has been questioned by some admiralty lawyers), includes: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of

It would be easy to find jurisdiction under that definition if an airplane were considered a vessel. While the dictionary includes "any of various types of aircraft" in the definition of the word "vessel,"[12] the courts have consistently held that an airplane is not a vessel.[13] The term "vessel" is itself defined in Title 18 of the United States Code,[14] but the definition does not make clear whether an airplane is to be included within its meaning. Section 7 (a) of the Air Commerce Act[15] specifically states that any definition of "vessel" found in the navigation and shipping laws of the United States shall not be construed to apply to airplanes. So it seems clear that without a new definition of "vessel" enacted by Congress to apply to Title 18 of the Code, there can be no doubt that an airplane is not a vessel.

The maritime jurisdiction also includes "the high seas." It is here that the court in the *Cordova* case was unwilling to make an extension of its jurisdiction to the air space above the high seas. When one examines the history of the term "upon the high seas" as it has appeared in the federal criminal statutes, there is strong support for the court's interpretation.[16] The wording of the law seems to have changed but slightly since its original enactment in 1790, when air travel was unthought-of. If Congress had consciously intended to broaden the scope of the maritime jurisdiction when it made the latest revision of the criminal code in 1948, it is reasonable that express wording would have been used so as to remove all possible doubts. It is more likely that this impending problem was not brought to Congress' attention, for it can hardly be thought that Congress intended to leave this air space above the high seas open for criminals to operate in with immunity.

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the jurisdiction of any particular state, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."

These crimes, defined and punished under Title 18 of the United States Code (Supp. 1949) are Arson, §81; Assaults, §113; Maiming, §114; Embezzlement and theft, §661; Receiving stolen property, §662; False pretenses, §1025; Murder, §1111; Manslaughter, §1112; Rape, §2031; Carnal knowledge of female under 16, §2032; Robbery and burglary, §2111.

[12] WEBSTER, NEW INTERNATIONAL DICTIONARY 2837 (2d ed. 1949), definition no. 3.

[13] Cases cited note 4 *supra.*

[14] U.S.C. §9 (Supp. 1949). "The term 'vessel of the United States,' as used in this title, means a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof."

[15] 44 STAT. 572 (1926), 49 U.S.C. §177(a) (1946).

[16] The history of the phrase "upon the high seas," as applied to jurisdiction over felonies, is as follows:

U.S. CONST. Art. I, §8, cl. 10: Congress shall have power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."

April 30, 1790. 1 STAT. 113. "That if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, . . . (he) shall be deemed, taken and adjudged to be a pirate and felon, . . ."

March 3, 1825. 4 STAT. 115. "That, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall commit the crime of wilful murder, or rape, . . . (he) shall be deemed guilty of felony, . . ."

March 4, 1909. 35 STAT. 1142. "The crimes and offenses defined in this chapter shall be punished as herein prescribed: First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, . . ."

June 25, 1948. 62 STAT. 685, 18 U.S.C. §7, as in note 11 *supra.*

But it was not necessary that the court should interpret the wording to apply only to a single geometrical plane. While the criminal laws of the United States are generally strictly construed,[17] the Supreme Court at an early date extended the phrase "upon the high seas," to include "in the sea"[18] thereby recognizing a three-dimensional effect to the statute. Unfortunately, the law of the air seems to have bewildered the courts each time a new issue of this nature has arisen. Most often the Congress has merely had to amend an existing law which the federal courts were reluctant to apply to airplanes.[19]

There is no doubt that Congress has the constitutional authority to provide for the punishment of crimes committed in the air over the high seas. Congress was given power to "define and punish Piracies and Felonies committed on the high seas."[20] While arguments may be suggested that this clause does not include the superadjacent airspace because air transportation was not contemplated by the framers of the Constitution, there is no doubt that the necessary statute would be within Congress' power to regulate foreign commerce.[21]

It is likewise clear that such a statute would not be contrary to international law. While no treaties have dealt with this subject,[22] most com-

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[17] *United States v. Wiltberger*, 5 Wheat. 76 (U.S. 1820). In that case the master of an American ship lying in the river Tigris in China was charged with manslaughter committed on board the vessel. The prosecution was laid under the Act of April 30, 1790, 1 STAT. 112, dealing with manslaughter committed "upon the high seas," but other places were not mentioned. §113 of the same statute dealt with murder committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state." Chief Justice Marshall refused to transfer the broad jurisdictional scope over murder to the crime of manslaughter, and to make the latter offense punishable when committed on a river.

[18] *United States v. Holmes*, 5 Wheat. 412, 418 (U.S. 1820). Defendant knifed the victim and then threw him overboard, as a result of which he drowned. The court was of the opinion that "it makes no difference whether the offense was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard."

[19] For example, the stowaway laws, 18 U.S.C. §2199 (Supp. 1949), as a result of *United States v. Peoples*, 50 F. Supp. 462 (N. D. Cal. 1943); THE MOTOR VEHICLE THEFT ACT, 18 U.S.C. §2312 (Supp. 1949), as a result of *McBoyle v. United States*, 283 U.S. 25 (1931).

[20] U.S. CONST. Art. I, §8, cl. 10.

[21] U.S. CONST. Art. I, §8, cl. 3.

"It has been asserted that Congress has no specific right to make laws for navigable airspace as it has for navigable waters of the United States inasmuch as there is no pertinent provision therefor in the federal Constitution. It is equally true that when that historic document was framed, flying by human beings was beyond the wildest dreams; and it is a reasonable presumption that with modern air travel conditions to face, its framers would have made adequate provision therefor." HAROLD BROWN, AIRCRAFT AND THE LAW 190 (1933).

The constitutional problem might arise in a case where a private pilot, flying his own plane, took a passenger for a "joy" ride, flew out over the ocean, murdered his companion, and then returned to his landing field in the United States. Since the flight could hardly be called foreign commerce, and had no effect thereon, there is serious doubt that the federal law would apply. Perhaps, though, the state in which he landed would have jurisdiction on the grounds that the act was "constructively committed" within that state. See note 8 *supra*.

[22] SHAWCROSS AND BEAUMONT, AIR LAW §586 (1945).

However, the draft Convention Relating to International Air Navigation at Paris, 1919, Art. 23, ¶3, provided that "Legal relations between persons on board an aircraft in flight are governed by the law of the nationality of the aircraft." Paragraph 4 said that "In case of crime or misdemeanour committed by one person against another on board an aircraft in flight the jurisdiction of the State flown over applies only in case the crime or misdemeanour is committed against a national of such state and is followed by a landing during the same journey upon its territory." SPAIGHT, AIRCRAFT IN PEACE AND THE LAW 142 (1919). Unfortunately, this article was entirely deleted from the final Convention because it was felt that the territorial sovereignty provisions of Art. 1 would cover all situations.

mentators have felt that the law of the air in this instance should be the same as the law of the sea — that the state of the flag of the airship should have criminal jurisdiction.[23] The Seventh Pan American Conference at Montevideo in 1933 adopted a resolution "To recommend the adoption of the following principles on the penalty for offenses committed on board aircraft: *** (2) Any aircraft without the boundaries of any State, on the high seas, is subject to the legislation and jurisdiction of its flag."[24] Certain national states have followed this principle. In England the Air Navigation Act of 1920, Section 14, renders amenable to trial any offender, British, foreign, or stateless, who commits "any offense whatever . . . on a British aircraft." Germany,[25] Italy,[26] Poland,[27] and China[28] also have similar provisions.

Thus it is seen that the only obstacle to finding jurisdiction in the *Cordova* case was the court's interpretation of the federal statute defining the area wherein assaults are punishable. Congress could rightfully have provided the necessary jurisdiction, both under the Constitution and under international law. It is also clear that the statute could have been construed so as to find that jurisdiction over crimes committed above the high seas had been provided for by Congress. The fact remains that the court did not so construe the law. A special Act of Congress is now required.[29] It can only be hoped that this amendment will be soon forthcoming.

PAUL GERHARDT*

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[23] See note 6 *supra*.

[24] U.S. Conf. Ser., No. 19 at 254 (Dep't State 1933).

[25] Law of May 6, 1940, [1940] I REICHSGESETZBLATT 754, says "The German Criminal Law shall apply to acts committed on a German ship or German aircraft regardless of the law of the place of commission." (Translated in U.S. War Dep't Pamphlet No. 31-122, THE STATUTORY CRIMINAL LAW OF GERMANY 9 (1946.)

[26] Law of Oct. 19, 1930, [1930] CODICE PENALE, Art. 4, says that the ships and aircraft of Italy are considered as territory of the state and are subject to Italian law except as provided by International law.

[27] THE POLISH PENAL CODE OF 1932, translated by Lemkin and McDermott (Duke Univ. Press, 1939), c. I, Art. 3, §1: "The Polish penal law is applicable to all persons who have committed an offense within the territory of the Polish State, or on a Polish vessel or aircraft."

[28] THE CRIMINAL CODE OF THE REPUBLIC OF CHINA, translated by Ching-Lin Hsia and Boyer Chu (Shanghai, 1936), c. I, Art. 3: "This Code shall apply to any offense committed within the territory of the Republic. An offense committed on board any Chinese vessel or aircraft, though it was lying at the time outside the territory of the Republic, shall be deemed to be an offense committed within the territory of the Republic."

[29] Arnold W. Knauth, maritime authority whose advice was cited in the instant case, urges an amendment to the Federal Criminal Code to make the federal criminal laws applicable "in all places subject to the jurisdiction of the United States beyond and outside the jurisdiction of any particular State and to all crimes and felonies and misdemeanors committed in or upon any vessel of the United States and any aircraft of the United States being in waters and harbors and in air-spaces and on airports in any foreign place, subject to the primary jurisdiction of the sovereign state in whose air-space or on whose airports such offenses are committed to take such action at the time and place of such offense as the authorities of such sovereign state may deem appropriate."

The 73rd Annual Meeting of the American Bar Association, held in Washington, D. C., September 18-22, 1950, adopted the following resolution:

> "RESOLVED, That the American Bar Association urges the revision of the present statute by the Congress of the United States so that the jurisdiction relative to crimes committed aboard surface vessels be extended to include crimes committed aboard aircraft operating over the land and waters over which the United States can exercise jurisdiction."

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BOOK REVIEWS

AIRWAYS ABROAD, by Henry Ladd Smith, University of Wisconsin Press, 1950. 370 p. $4.00.

Interviews between the author and many of the personalities involved in pioneering U.S. air routes abroad have provided additional color for this story of colorful events and struggles. Fortunately, for the author, the expansion of commercial flying beyond the borders of the United States has been so rapid that many of the pioneers are still available both for interviews and for reading authors' manuscripts. Perhaps in deference to this latter process, the author has avoided critical comment of this own and merely reported on the attitudes of others.

The chapter on President Franklin Roosevelt's role in the direction of U.S. international civil aviation after 1944 is most interesting as it presents the diary account of then-Assistant-Secretary of State-Adolph A. Berle, Jr. regarding the White House meeting between Roosevelt; Undersecretary of State Edward Stettinius Jr.; the President's assistant and adviser, Harry Hopkins; Chairman of the Civil Aeronautics Board L. Welch Pogue; and Mr. Berle.

"Shooting it out at Chicago" furnishes good coverage of the beginnings of the present international aviation body in the UN, ICAO. Other intriguingly titled chapters such as "Bermuda Honeymoon," "North Atlantic Tempest," and "No More Oceans to Cross" maintan reader interest up to the final "Report on Winds Aloft."

CHARLES T. LLOYD

DEVELOPMENT OF AIRCRAFT ENGINES AND FUELS, by Robert Schlaifer and S. D. Heron, Harvard Business School, Division of Research, 1950. 754 p. with appendicies. $5.75.

It is a great misfortune that the title of this book may cause those who would be most interested in reading it to pass it up in the belief that it is a textbook for engineers. Although it is a detailed account of the development of engines and fuels (especially engines), it is not only readable but provides documentation for some significant conclusions. Anyone, civilian or military, interested in the relation between government and industry in the development of better power plants for better aircraft will profit from the account of the difficulties of the military services in developing new engines as contrasted with their successes in outguessing industry on new ideas to be explored.

The economist will find material on financial risks, production cost problems, and the effect of the hope of quantity sales on investing in the development of radical innovations. A chapter on the development of accessories although concluding that specialist producers are a necessary supplement to engine builders warns, inter alia, that in the absence of competition the engine builder and the government must be vigilant in seeing that the accessory maker keeps progressing.

Even Part II of Prof. Schlaifer's section of the book on the development of specific engines maintains interest for the general reader as the reasons behind U.S., British, and German advances are discussed. Chapter XVII on policies that resulted in the late start of the U.S. in turbo-jets which the author calls "The True Explanation" is worthy of examination.

Author Heron's portion of the book again is of wider interest than would be surmised from the title because it is a history of government and industry relations in the development of aircraft fuels with citations to some fuel prejudices that should be a lesson for the future.

E. C. S.

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